IN THE COURT OF APPEAL

AT NYERI

(Coram: Hancox JA , Chesoni & Nyarangi Ag JJA)

CRIMINAL APPEAL NO 128 OF 1983

Between

MWAU .....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Nyeri, Patel J)

JUDGMENT OF COURT

The appellant, who was a Senior Staff Instructor at the Police College at Kiganjo, was charged before the Senior Resident Magistrate at Nyeri with unlawful trespass within the college, contrary to section 3(1) of the Trespass Act cap 294, and with disorderly conduct in a police building contrary to section 60(1) of the Police Act, cap 84. He was at that stage represented by Mr Kioko, who challenged the validity of the charges and invited the court to reject them under section 89 (5) of the Criminal Procedure Code. The magistrate, in a reserved ruling, disallowed the objection, stating that the charges were not bad on the face of them, but that it would depend on the evidence as to whether they were established or not.

The prosecution then tendered a written *nolle prosequi* signed by Mr Metho, the Provincial State Counsel for Central and Eastern provinces at the material time, who is one of the holders of the offices specified in Legal Notice 54 of 1969. This was made under section 83 of the Criminal Procedure Code, which purports to confer on the Attorney–General the power to delegate his function of entering a *nolle prosequi* under section 82. Mr Kioko thereupon objected, saying that there was no power of delegation, and requested the Court to refer the question to the High Court for determination under section 67 (1) of the Constitution. Mr Kioko submitted, as Mr Wambeu has before us, that as the advocate for one of the parties, the appellant, had so requested, the court was mandatorily obliged to refer the substantial question of law to the High Court for decision. The question of law was as to whether the Attorney-General's power to enter a *nolle prosequi* could validly be delegated in view of subsection (6) of section 26 of the Constitution which states:

> The power conferred on the Attorney-General by paragraph (b) and (c) of subsection (3) shall be vested in him to the exclusion of any other person or authority.

Paragraph (c) of section 26 (3), provides that, the Attorney –General has power to discontinue at any stage before judgment is delivered any criminal proceedings against any person instituted or undertaken

by himself or any other person or authority.

We think the magistrate put it very well when he said:

> In my view the purpose of section 26 is not to ensure that only the Attorney-General in person can enter a *nolle*, but to prevent any future legislation conferring the power on any other person of authority. This interpretation is clearly reflected in the second paragraph of section 26(b) of the Constitution which permits the withdraw(al) with the consent of the court in any criminal proceedings instituted by any other person or authority other than the Attorney–General. For this reason I rule the *nolle* admitted and discharge the accussed."

The point of interpretation of the Constitution which is said to arise is that the legal notice in question, delegating the powers vested in the Attorney-General by Section 82 (1) of the Criminal Procedure Code, under section 83 of the Criminal Procedure Code, was invalid by reason of the section in the Constitution to which we have referred.

We therefore have the strange spectacle of a person who has been discharged after the entering of a written *nolle prosequi* from facing criminal charges, seeking to overturn that decision so that he does face criminal charge which is still extant.

We agree with Mr Wambeu that if the case had been properly before the High Court, the summary rejection procedure was inappropriate, as we have said on many occasions, when valid points of law are raised in the petition of appeal to it, but in our view there was no valid situation here which gave rise to an appeal. There was not in being any charge upon which the appellant was in jeopardy, or any order which was to his prejudice. We cannot see that because the Attorney-General may wish in the future to prefer another charge or charges against the appellant, and this possibility haunts him, that this gives him any valid grievance under the Constitution which requires redress by the court. Nor can we agree that the fact of preferring charges, which, notwithstanding the magistrate's ruling , are in the submission of Mr Wambeu bad charges, can amount to inhuman treatment under section 74 (1) of the Constitution. The section refers to treatment, physical or mental, which can properly be regarded as inhuman, that is to say either akin to torture, which is also mentioned in that sub-section, or as the *Oxford Dictionary* puts it, treatment:-

> Not having the qualities proper or natural to human being; destitute of natural kindness or pity; brutal, unfeeling.

We do not consider that the preferring of a charge can, certainly in the circumstances of this case, amount to inhuman treatment under section 74(1).

It may be that if and when another charge or charges based on the same facts are brought against the appellant he can make a submission which falls within section 67 of the Constitution, (which is what happened in *Zai Ernest Mwangombe and another v Republic* (*infra*) but, in our opinion, that has not yet arisen here, for it is clear from the Magistrate's record that he at no time formed the opinion that the question raised involved a substantial question of law, which is a pre-condition for a reference under subsection (1). The appellant could, of course, have appealed direct to the High Court, under subsection (4) of section 67 of the Constitution, the Magistrate having given a final decision on a question as to the interpretation of the Constitution. The only other way in which an appeal to the High Court could have been entertained was if there had been conviction on trial so as to found an appeal under section 347 (1) of the Criminal Procedure Code (cap 75), or a forfeiture of a recognisance, which gives a right of appeal under section 132.

As regards the other question of whether the delegation of the Attorney- General's power to enter a *nolle prosequi* is *intra vires*, this has recently been the subject of a constitutional reference in *Zai Ernest Mwangombe and Another v Republic* Miscellaneous Criminal Application No 79 of 1984 and the High Court, consisting of Simpson CJ, Todd and Gachuhi JJ, held that the power to discontinue criminal proceedings conferred on the Attorney-General by section 26 of the Constitution can be exercised by the

holders of the subordinate offices to whom it had been delegated by him under section 83. But in that case, as we have just indicated, the question of the delegation of the power to enter a *nolle prosequi* was raised in subsequent proceedings, where there existed a situation potentially detrimental or prejudicial to the subject. In other words the applicants there were again in jeopardy.

This is not the position here. Indeed Mr Wambeu admitted to us towards the close of submissions that one of his objects in trying to get this court to say that these charges were bad on the face of them, or that a constitutional right had been infringed, was to supply an ingredient in a proposed civil action against the Police College, possibly of malicious prosecution.

We do not therefore consider that there was any matter which required redress by the High Court in the instant case. Indeed there was no reference to the High Court at all, nor is the purported appeal framed as though it is brought under sub-section (4) of section 67, which is, as we have said, the only way in which the High Court could have entertained an appeal other than under the Criminal Procedure Code. There is of course the right to apply for redress of a constitutional infringement under section 84 of the Constitution, but we note that in *Anarita Karimi Njeru v Republic*, Criminal Appeal no 4 of 1979, this court decided that no right of appeal lay to the Court of Appeal from a decision of the High Court on an application under section 84. It may be, though the point has not yet arisen for decision, that this court would decide similarly in an appeal from a reference under section 67.

That is not, however, the matter before us. The matter before us is a purported second appeal from the decision by the High Court on an appeal from the Senior Resident Magistrate, Nyeri. All the magistrate did was to act on the *nolle prosequi* handed in to the court. In this he had no choice. He could not have rejected it, nor could have questioned its validity, as it was signed by a person in whom the power had apparently correctly been vested by Legal Notice 54 of 1969. If some valid point arose on the Constitution it could have been referred to the High Court under sub –section (1) of section 67 of the Constitution or direct under sub-section (4) . But this was not the way in which the matter came to the High Court, nor could it, because by then there were no proceedings in existence to give foundation for such a reference or appeal.

The special position of the Attorney-General in England in such matters was referred to in *Gouriet v Union of Post Office Workers*, [1977] 3 AER 70, which was an authority on actions brought by the Attorney-General *ex relatiore*, and that case was, in turn referred to by this court in *Alfred Njau and others v City Council of Nairobi* [1983] 1 KCA (unofficial) 159. But , though *Gouriet*'s case was a decision dealing specifically with the Attorney-General's exercise of his discretion in deciding whether or not to consent to the bringing of the action at his relation, it is relevant here, inasmuch as it was suggested in that case that the courts, exceptionally, had some control over the exercise of his discretion in that respect whereas they did not have any control over the exercise of his discretion in other respects. One of those other respects was the Attorney –General's discretion whether or not to enter a *nolle prosequi*. Lord Dilhorne said at page 88:

> The Attorney-General has many powers and duties. He may stop any prosecution on indictment by entering a *nolle prosequi*. He merely has to sign a piece of paper saying that the does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence. In the exercise of these powers he is not subject to direction by his ministerial colleagues or to the control and supervision of the courts. If the court can review his refusal of consent to a relator action, it is an exception to the general conclusion that the courts can do so.

Nothing could be clearer than that statement. It shows beyond peradventure that the magistrate in this case was (as we have already said) obliged to accept the *nolle prosequi* and dischage the appellant.

Before concluding, we wish to refer again to *Mwangombe*'s case. The High Court in effect held that there was no magic in the record "vest", nor had it any technical meaning. It simply meant that the holders of the offices named in the Legal Notice were furnished with the authority and power to do that which the

Attorney General can do under section 82. The word “vest” is only defined in *Stroud’s Judicial Dictionary* and in *Words and Phrases* in relation to rights of property and devises under testamentary and similar dispositions. In the S*horter Oxford English Dictionary* there occurs this definition:

To invest a person with some quality, especially power, authority, etc.

Thus it would be possible to vest the powers under section 82 in officers subordinate to the Attorney-General under section 83 of the Criminal Procedure Code, were it not for section 26 of the Constitution , which provides that the powers conferred on the Attorney-General, *inter alia*, to discontinue criminal proceedings, shall be vested in him to the exclusion of any other person or authority. A moment’s reflection will reveal the reason for this provision is that constitutionally only the Attorney-General may possess the power to discontinue criminal proceedings. He may legally authorize his subordinates to exercise the power but we doubt if he can vest them with it, and we note that the word “exercise” appears in subsection (5) of section 26 of the Constitution, and that there is a reference to the powers being “exercised” in section 83.

However in view of that which we have said in this judgment it is not necessary for us to go further in our decision than to hold that, as no constitutional right has been infringed as yet, and as the magistrate was bound to act on the *nolle prosequi* and discharge the appellant, the appeal to us must in all the circumstances, fail.

The appeal is accordingly dismissed.

Dated and delivered at Nyeri this 26th day of May , 1984.

A.R.W HANCOX

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JUDGE OF APPEAL

Z.R CHESONI

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Ag. JUDGE OF APPEAL

J.O NYARANGI

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Ag. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR