



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL CASE NO. 61 OF 2019

REPUBLIC

PROSECUTOR

VERSUS

BRASIA OTIENO OGUTU
ACCUSED

RULING

1. The Accused BRASIA OTIENO OGUTU was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It was stated that on the 20th day of September 2019 at Lusheya Village, Lusheya Sub-location, Musanda Location in Mumias West Sub-County within Kakamega County, the Accused murdered Felix Omondi.
2. The Accused, who was arrested on 20th September 2019 was arraigned in court on 8th October 2019 where the

- Deputy Registrar of the court noted that the medical report indicated that the Accused was unfit to take plea.
3. After several appearances in court for Mention, the Accused was committed to Mathari Mental Hospital for treatment vide an order dated 22nd December 2019.
 4. After the orders of the court, the Accused was committed to Mathari Mental Hospital under Section 162 of the Criminal Procedure Code where he underwent treatment and on 29th June 2022, the Medical Superintendent, Mathari National Teaching and Referral Hospital forwarded a certificate of capability to make defence under Section 163 (1) of the Criminal Procedure Code to the ODPP asking that the ODPP seeks directions on the matter.
 5. On 25th October 2022, the Accused was presented before the court which made an order that the Accused be taken to Kakamega County Referral Hospital for mental assessment to ascertain whether the Accused was mentally fit to take plea.
 6. Mental assessment was not undertaken until 18th July 2023 when the Psychiatrist Consultant, Kakamega County General Hospital did perform a mental assessment and

filed a report in which she stated that in her opinion, the Accused was not fit to stand trial. She noted that the Accused had been re-initiated on medication. My conclusion is that the cause of the relapse in the Accused person's mental condition was the failure to adhere to the prescribed medication.

7. Faced with the dilemma of an Accused person who is mentally unstable, the prosecution on 31st October 2024 urged the court to invoke Section 162 of the Criminal Procedure Code in dealing with the Accused.
8. Section 162 of the Criminal Procedure Code provides that:-

“(1)When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.

(2)If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case. *Powers delegated to the***

Cabinet Secretary and to the Principal Secretary of the Ministry for the time being responsible for prisons, by L.N. 579/1963.

(3) If the case is one in which bail may be taken, the court may release the accused person on sufficient security being given that he will be properly taken care of and prevented from doing injury to himself or to any other person, and for his appearance before the court or such officer as the court may appoint in that behalf.

(4) If the case is one in which bail may not be taken, or if sufficient security is not given, the court shall order that the accused be detained in safe custody in such place and manner as it may think fit, and shall transmit the court record or a certified copy thereof to the Cabinet Secretary for consideration by the President.

(5) Upon consideration of the record the President may by order under his hand addressed to the court direct that the accused be detained in a mental hospital or other suitable place of custody,

and the court shall issue a warrant in accordance with that order; and the warrant shall be sufficient authority for the detention of the accused until the President makes a further order in the matter or until the court which found him incapable of making his defence orders him to be brought before it again in the manner provided by sections 163 and 164.”

9. The social inquiry established that the Accused's family is prepared to embrace him and reintegrate him to the society. To that end, they have renovated his parent's house. The family members expressed their commitment to ensure that the Accused adheres to his prescribed medication and attends regular clinic appointments. The Probation Officer who conducted the social inquiry opines that there appears to be a conducive environment to facilitate his rehabilitation and minimize the risk of re-offending.
10. The victim's family, though still grieving the loss of their loved one, are said to acknowledge the need for the Accused's rehabilitation. The community is also willing to

support the rehabilitation efforts and are not opposed to the Accused's reintegration to the society albeit with some cautious reservations.

11. On 29th July 2025, the prosecution sought to terminate the proceedings under Article 157 (6) (c) and 157 (9) of the Constitution. In furtherance of their application, the prosecution entered a '*Nolle Prosequi*' dated 28th July 2025. The basis of the *Nolle Prosequi* is that the 1st Accused absconded court and the case against the 2nd Accused is predicated on a confession statement made by the 1st Accused and which had not yet been produced. The prosecution submitted that if they were to proceed with the case as it was, it would automatically lead to the acquittal of the 2nd Accused. The Accused's Counsel did not oppose the application.

12. The Director of Public Prosecutions requires the leave of the court in order to terminate criminal proceedings.

13. Article 157 (6) (c) of the Constitution provides:-

“(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

(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)."

Article 157 (8) and (9) provide:-

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

(9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions."

14. While exercising his powers to enter a *Nolle Prosequi*, the Director of Public Prosecutions is guided by Article 157 (11) of the Constitution which states:-

"(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of

the administration of justice and the need to prevent and avoid abuse of the legal process.”

15. From the legal provisions set out in the Constitution, whereas the Director of Public Prosecutions has discretion as to when to enter a *Nolle Prosequi*, the discretion must be exercised with due regard to the interest of the public. The Director of Public Prosecutions should also observe due care lest he applies the powers donated to him by the Constitution to protect suspects or frustrate the cause of justice. The decision to enter a *Nolle Prosequi* must therefore be well thought out and should not be capricious, irrational, unreasonable, nor arbitrary. It must be demonstrated that there are cogent reasons for seeking the termination since the Director of Public Prosecutions is enjoined by the Constitution to act justly and fairly.
16. The circumstances under which the court can grant leave to enter a *Nolle Prosequi* were considered by a three Judge Bench in the case of **Republic v. Assa Kibagendi Nyakundi (Criminal Revision 524 of 2020 [2023] KEHC 1063 (KLR)** when the court held as follows:-

“80. We hold that, in considering whether to grant the application for discontinuance of the proceedings, the trial court needed to consider primarily the threshold set under article 157(11) of the Constitution as to whether the applicant was acting in public interest, the interests of the administration of justice and to prevent and avoid abuse of legal process.

81. In that case to determine whether the applicant complied with the aforesaid threshold the court will consider inter alia: -a) Whether the application is brought in good faith.

b) Whether matter in issue is a matter in which the society has a stake.

c) Whether the party against whom the proceedings are to be discontinued will suffer any prejudice if the application is allowed or denied.

d) Whether the reasons advanced for the application are reasonable, sufficient and/or adequate.

e)Whether the matter to be withdrawn has commenced hearing or is fresh matter.

f)Whether there has been inordinate delay in making the application for withdrawal.

g)The sentiments of the respondent to the application.”

17. Flowing from the above rendition, it is clear that the ODPP should be allowed to enter a *Nolle Prosequi* only if he demonstrates that he is acting within the confines of the law.
18. On 8th April 2025, I had admitted the Accused to bond pursuant to Section 162 (3) of the Criminal Procedure Code to enable him access treatment on the following terms:-
- (a) That the Accused shall be released on a personal bond of Ksh. 300,000/= with one surety of similar amount.
 - (b) That the surety shall execute an undertaking to ensure that the Accused attends a Psychiatric Clinic monthly and that he strictly adheres with medical prescriptions until further orders of the court.

- (c) That the surety shall produce the Accused, alongside evidence of monthly clinical attendance and review to this court every three (3) months until further orders of the court.
19. The release was premised on my concern that Accused faced a likelihood of a vicious cycle of admission to Mathari Hospital due to likelihood of relapse as a result of failure to access medication. The Accused has been unable to access medication from the Kakamega County General Hospital and hence the Accused's mental status cannot stabilize as he needs continuous uninterrupted medication.
20. I have previously expressed the court's view that the Accused is entitled to equal treatment as other people of sound mind as guaranteed by Article 27 of the Constitution. It is the further view of the court that the Accused should not be discriminated against merely because of his mental state. To keep the Accused in custody for an extended indeterminate period is to subject him to cruel, inhuman or degrading treatment in

contravention of Article 29 of the Constitution which provides that:-

“Every person has the right to freedom and security of the person, which includes the right not to be—

(a)deprived of freedom arbitrarily or without just cause;

(b)detained without trial, except during a state of emergency, in which case the detention is subject to Article 58;

(c)subjected to any form of violence from either public or private sources;

(d)subjected to torture in any manner, whether physical or psychological;

(e)subjected to corporal punishment; or(f)treated or punished in a cruel, inhuman or degrading manner.”

21. In **Hassan Hussein v. Republic [2016] eKLR**, Kiarie J. held that Section 167 (1) of the Criminal Procedure Code is discriminative to persons with mental illness as it

- prescribes their detention in prison instead of a health facility and for the detention to be indeterminate.
22. I note that to date, the Accused has not been able to meet the terms of the bond and consequently is still in custody despite the social inquiry report confirming that his next of kin are willing to give him continued medical care and to monitor him closely. Nevertheless, the court needs to exercise caution in discharging the Accused.
23. Before making a determination, the court sought to know whether the Accused has a good psychosocial support system that would ensure that he receives regular medical review and that he is not a danger to himself and to the society. The court had the opportunity to interrogate one Jane Truffena Akech who said that she is the Accused's aunt by virtue of her marriage to his father's elder brother. She informed the court that both of the Accused's parents are deceased. She also said that her husband is deceased and she lacks the means or capability to take care of the Accused in the event of his discharge. She said that there were no other family

members apart from her and therefore she prayed that the government helps her with the Accused.

24. I am satisfied that the *Nolle Prosequi* is not founded in bad faith. However, the circumstances are such that discharging the Accused is not the right move at this point. The Accused has not been declared as mentally fit and could be a danger to himself and to the society if he does not have a suitable guardian. It is therefore not in the public interest to discharge the Accused.

25. The upshot is that the application to enter a *Nolle Prosequi* is declined. The Accused shall continue to remain in custody pending further orders of the court.

Dated, signed and delivered at Kakamega this 16th day of December 2025.

**A. C. BETT
JUDGE**

In the presence of:

Ms. Chala for the Prosecution

No appearance for the Accused's Counsel

Court Assistant: Polycap