

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL CASE NO. E040 OF 2024

REPUBLIC.....

.....PROSECUTOR

VERSUS

PC VICTOR KADIMA WAMUKOYA.....

ACCUSED

RULING

1. The accused was charged with the offence of murder, contrary to section 203 as read with section 204 of the Penal Code.
2. A brief background to the matter is important in order to understand the genesis of the case. The background is derived from the material already presented in court.
3. At the material time, the accused was working as a police officer attached to Muthara Police Station, within Meru County. On 30th July 2020, he and other police officers from the said station were on normal patrol. They went to a homestead where illicit alcohol was being consumed. As they

were effecting arrest of the people they found there, the deceased ended up being shot. He succumbed to the injuries. Investigations into his death were conducted. It was established that the gunshots came from the firearm that the accused was carrying at the time.

4. After the said incident enquiries were made and Inquest File No. E001 of 2021 was filed at Tigania Principal Magistrates' Court. A ruling was delivered on 3rd January 2023 and the following findings were made by the trial magistrate:

“In conclusion having analysed the evidence adduced, I am satisfied that PW6 (the accused in this case) acted as he did to protect himself and PW7 from attack from the deceased and to prevent a crime, thus his actions cannot be stated to be unlawful even if his actions led to the death of the deceased in the opinion of the court. His defence of self-defence is glaring from the evidence adduced before the court and the said action in the opinion of the court was necessary and reasonable in the circumstances despite it

leading to the unfortunate loss of life of the deceased

5. From the material before the court it is also evident that the incident was also investigated by the Independent Police Oversight Authority (IPOA), an institution created by an Act of Parliament to give effect to Article 244 of the Constitution by giving civilian oversight over the work of the police in Kenya.
6. The IPOA recommended that the accused be charged with the offence of murder.
7. On 23rd July 2024, this case was registered in this court. The accused was not present and summons were issued to him. The court record shows that the summons remained unexecuted for a while but eventually the accused was arraigned in court under a warrant of arrest on 14th July 2025. On 31st July 2025, he was presented to the court for plea where he pleaded not guilty to the charges. Pursuant to a ruling delivered on 18th December 2025, the accused was granted a bond of Kshs.300,000/= with a surety of similar

amount. However, he was unable to secure a surety and he remains in custody.

8. On 20th January 2026, the prosecution informed the court that it intended to enter a *nolle prosequi* against the accused under section 82 of the Criminal Procedure Code.
9. Owing to the unique circumstances of the case, this court directed that the *nolle prosequi* and the accompanying reasons be served on IPOA, who were interested in the matter.
10. Upon service of the intended *nolle prosequi*, the IPOA filed a response, opposing the same.
11. This ruling is thus in respect to the said *nolle prosequi* which is signed by one E.P.O Omooria, Senior Assistant Director of Public Prosecution. It was accompanied by a letter by the said officer, dated 21st January 2026 citing the reasons for the *nolle prosequi*.
12. The accused did not oppose the said application.

Submissions by the Director of Public Prosecution (DPP).

13. It was submitted that the office of the DPP created under Article 157(1) of the Constitution is an independent office. That under Article 157(6)(c) the DPP has the power to discontinue criminal proceedings at any stage before judgment is delivered upon seeking leave of the court.
14. It was further submitted that the *nolle prosequi* was informed by the findings made by the subordinate court in the inquest file. That while the findings of the subordinate court are not binding on the DPP, the DPP has the discretion to make the decision to charge and the DPP's decision is subject to a continuous independent process contingent on the availability of new facts or evidence in a criminal case. That having reviewed the file, the DPP was of the view that there wasn't sufficient evidence to sustain a conviction, hence the *nolle prosequi*.
15. It is further submitted that the decision to charge or withdraw charges rests with the DPP and the objection by IPOA is an attempt to usurp the DPP's powers which are expressly set out under Article 157 of the Constitution.

16. The prosecution counsel urged the court to allow the *nolle prosequi* and terminate the proceedings.

Accused's Submissions

17. The accused unsurprisingly, wholly supported the *nolle prosequi*.

18. It was submitted that IPOA's objection to the *nolle prosequi* is an overstep of its mandate which is set out under sections 6 and 7 of the Independent Police Oversight Authority Act (IPOA Act).

19. It is pointed out that despite IPOA's disagreement with the findings of the inquest file, no appeal was filed nor was there an application to review the said decision.

20. The accused further submitted that IPOA has misinterpreted the law since its oversight role is over the National Police Service and not the DPP. That once it makes its recommendations to DPP, IPOA's powers and involvement in any matter are extinguished. Cited in support of this submission was **Chibungo Sanga -vs Republic (2017) e KLR.**

IPOA's Submissions

21. It was submitted that the case arose out of investigations concluded by IPOA into the incident and it concluded and recommended that the accused be charged with the offence of murder. That upon receipt of IPOA's recommendation, the DPP confirmed that there existed direct evidence demonstrating that the accused shot the deceased and that the said evidence was sufficient to sustain a conviction for the offence of murder.
22. It was submitted further that reliance on the outcome in the inquest file was placed notwithstanding that the accused had already been arraigned in court. That the attempt to terminate the proceedings raises serious concerns as to the propriety, timing and legal basis of the intended discontinuance, given that the matter has already crystallised into a substantive criminal trial property before court.
23. It was also submitted that the intended discontinuance of the case does not meet the threshold set out under Article 157(11) of the Constitution. Further that the *nolle prosequi*

undermines IPOA's statutory mandate as an investigative agency. That IPOA occupies a unique position as a representative of victims seeking accountability on their behalf. Cited in support of this particular submission was the case of **Republic vs Fredrick Ole Leliman and 4 Others, Criminal Case No. 57 of 2016.**

24. It was further submitted that contrary to the provisions of Article 157(II) of the Constitution the DPP has failed to give reasons for entering the *nolle prosequi*. That the DPP has failed to demonstrate how it is in the interest of justice or is meant to prevent abuse of the legal process. That arbitrary, capricious or unexplained withdrawals undermines confidence in the judicial system. Citing **Republic vs Enock Wekesa and Another (2010) KEHC 4133 (KLR)**, it was submitted that the DPP has a duty to provide cogent reasons for entering a *nolle prosequi*. Also cited was **George Taitumu vs Chief Magistrates Court Kibera and 2 Others (2014) KEHC 6173 KLR.**
25. It was also submitted that the powers of the court to consider a withdrawal of a criminal case is meant to avoid an

abuse of the court process so that it is not used to shield accused persons from accountability or defeat the ends of justice or manipulate proceedings for various purposes.

26. On the DPP's reliance on the findings in the inquest file it was submitted that this was a misapprehension of the law regarding inquest. That an inquest's purpose is limited to establishing the circumstances surrounding a death and identifying any person who is responsible for such death. That an inquest does not determine criminal liability and does not exonerate any person from such criminal responsibility. That only a trial court is equipped with the legal basis to determine such responsibility upon a full trial. Cited in support of this submission was **Benedict Kioko (deceased) vs Republic (2025) KEHC 9391 (KLR)**.
27. It was further submitted that the intended *nolle prosequi* undermines the constitutional and statutory mandate of IPOA to investigate deaths and serious injuries arising from police actions. That such investigations are conducted independently.

28. That it was perplexing that the DPP recommended that the accused person be charged with full knowledge of the finding in the inquest file and later purport to look at the same matter and decide to withdraw the charge. That at the very least, the prosecution ought to have considered IPOA's views but the decision was made unilaterally, without consideration of IPOA's powers to investigate the matter. Cited to support this particular submission was the decision in **Fredrick Mulaa vs DPP and Another (2025) KEHC 12596 (KLR)**.
29. It was further submitted that the intended *nolle prosequi* violates the victim's participatory rights and undermines public confidence in the administration of justice. That the victim's rights are protected by the Constitution and the Victims Protection Act and that the withdrawal would occasion prejudice to them on the question of victim's rights in the criminal justice system. IPOA cited **Joseph Lennox Mwandware vs Republic. Criminal Appeal No. 132 of 2016**.

30. With the above submissions, IPOA prayed that the court rejects the *nolle prosequi* and orders that the trial proceeds.

Analysis and Determination

31. Having considered the matter, I find that the issues for determination are:

- a. What are the powers of the DPP to withdraw a case pending before a court?
 - b. Whether the intended *nolle prosequi* meets the threshold under Article 157(11) of the Constitution.
 - c. The victim's rights and role in the process of withdrawal of the criminal case.
 - d. Whether reliance of the findings in the inquest file was a misdirection in law.
32. The office of the Director of Public Prosecution (ODPP) is established under Article 157(1) of the Constitution. The powers of the DPP to terminate a case are set out under sub Article (6)c) which states as follows:

Subject to clauses (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).

33. Sub-Article (8) of the Constitution stipulates that the DPP may not discontinue a prosecution without the permission of the court.
34. Sub-Article (11) then provides as follows regarding the exercise of the DPPs powers;

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.

35. It is thus clear that while the DPP is independent, any withdrawal of a case has to be with the permission of the court. This provision is deliberate. It is meant to provide a check and balance of the massive powers wielded by the DPP. The court has a duty to establish if the intended

withdrawal is in the public interest, in the interest of administration of justice and or made in order to prevent and avoid abuse of the legal process.

36. This position has been affirmed in several decisions. For instance, in **Republic vs Siatah (2025) KEHC 6026 (KLR)**, the court held as follows:

‘Under Article 157[11] of the Constitution, the Director of Public Prosecution 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 in the exercise of the powers conferred by the provision.

Despite all the foregoing, the Director of Public Prosecutions may not discontinue a prosecution without the permission of the court as provided in Article 157[8] of the Constitution.

37. Similar findings were made in **Seenaj Ene Persimei Esbo Sisine and 8 Others vs Republic (2013) KEHC 3329 KLR.**
38. There is no doubt that there has been a considerable development in the law and jurisprudence on the role of a victim in the criminal justice system.
39. Previously, the victim's role was basically that of a spectator as it was assumed that the State would adequately cater of the victim's interests. Thus, a victim of an offence had a very limited platform to address the court, for instance, in cases of withdrawal of a complaint.
40. The law now fully recognises that a victim or his/her family has a bigger role to play.
41. In this regard, there are laws that have specifically enacted expressing what a victim is entitled to in a criminal trial. Such laws include:
- a. The Criminal Procedure Code (CPC) which at section 137D provides for consultation by the DPP when entering into a plea bargain agreement.

- b. Section 329A of the CPC which provides for victim impact statements prior to sentencing a convicted person.
 - c. Section 20 of the Victim's Protection Act which provides for the right of the victim to be heard in cases of plea bargaining, bail hearing, sentencing or a decision to lay a charge or to appeal or withdraw such a charge.
42. The said laws derive their mandate from Article 50(9) of the Constitution which provides as follows: -
- “Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences”.**
43. Following from the above, it is clear that victim's rights in criminal case ought to be considered throughout the trial. However, such consideration should not infringe on the accused's right to a fair and expeditious trial.
44. In the instant case, IPOAs case is that it has come in place of the victim who died as a result of gunshot wounds. It is said that it duly conducted its independent investigations

and recommended that the accused be charged, which happened.

45. The role of IPOA in a case such as this cannot be undermined. Its mandate is set out under section 6 of the IPOA Act as follows;

The functions of the Authority shall be to—

(a) investigate any complaints related to disciplinary or criminal offences committed by any member of the Service, whether on its own motion or on receipt of a complaint, and make recommendations to the relevant authorities, including recommendations for prosecution, compensation, internal disciplinary action or any other appropriate relief, and shall make public the response received to these recommendations;

(b) receive and investigate complaints by members of the Service;

(c) monitor and investigate policing operations affecting members of the public;

(d) monitor, review and audit investigations and actions taken by the Internal Affairs Unit of the Service in response to complaints against the Police and keep a record of all such complaints regardless of where they have been first reported and what action has been taken;

(e) conduct inspections of Police premises, including detention facilities under the control of the Service;

(f) co-operate with other institutions on issues of Police oversight, including other State organs in relation to services offered by them;

(g) review the patterns of Police misconduct and the functioning of the internal disciplinary process;

(h) present any information it deems appropriate to an inquest conducted by a court of law;

(i) take all reasonable steps to facilitate access to the Authority's services for the public;

(j) subject to the Constitution and the laws related to freedom of information, publish findings of its investigations, monitoring, reviews and audits as it sees fit, including by means of the electronic or printed media;

(k) make recommendations to the Service or any State organ;

(l) report on all its functions under this Act or any written law; and

(m) perform such other functions as may be necessary for promoting the objectives for which the Authority is established.

46. The powers of IPOA are set out under section 7(1) which states as follows:

The Authority shall have all the powers necessary for the execution of its functions under this Act, and without prejudice to the generality of the foregoing, the Authority shall have the power—

(a) to investigate the Service on its own motion or on receipt of complaints from members of the

public, and for that purpose, to gather any information it considers necessary by such lawful means as it may deem appropriate, including by

—

(i) requisition of reports, records, documents or any information from any source, including from the Police, irrespective of whether that source is located within or outside Kenya and irrespective of whether any other person or body, other than a court of law, has already instituted or completed a similar investigation or similar proceedings;

(ii) entering upon any establishment or premises, including Police premises, on the strength of a warrant, and subject to any relevant law, where the premises are a private home or dwelling;

(iii) seizing and removing any object or thing from any premises, including Police premises, which may be related to the

matter investigation, and in respect of which a receipt shall be given to the owner or person apparently in control of the object or thing;

(iv) interviewing and taking statements under oath or affirmation from any person, group or members of organizations or institutions and, at its discretion, to conduct such interviews in private;

(v) summoning any person to meet with its staff, or to attend any of its sessions or hearings, and to compel the attendance of any person who fails to respond to its summons;

(vi) administering oaths or affirmations before taking evidence or statements where necessary;

(vii) summoning any serving or retired Police officer to appear before it and to produce any document, thing or information that may

be considered relevant to the function of the Authority;

(viii) ensuring that where necessary, the identities of complainants or witnesses are not disclosed to their detriment;

(ix) recommending to the Director of Public Prosecutions the prosecution of any person for any offence;

(x) investigating any death or serious injury occurring or suspected of having occurred as a result of police action.

(b) to take over on-going internal investigations into misconduct or failure to comply with any law if such investigations are inordinately delayed or manifestly unreasonable;

(c) where appropriate, to provide relevant information to enable a victim of unlawful police conduct, to institute and conduct civil

proceedings for compensation in respect of injuries, damages and loss of income;

(d) require the Director of Public Prosecutions to provide it with his response to any recommendation made by the Authority to prosecute any person or body;

(e) require the Service to within a specified, reasonable time, provide it with information on issues relating to policy, its implementation and effectiveness, and its response to any recommendation made to it by the Authority;

(f) subject to the approval of a complainant, and only if it is not a serious complaint, reconcile or mediate on any matter within its mandate; and

(g) exercise any other power provided for in this Act or any other law which is necessary for the effective performance of its functions

47. As can be seen IPOA's mandate and powers in a case such as this are entrenched in the law. It is meant to complement several institutions such as the DPP in undertaking investigations into actions involving police officers.
48. In my view, IPOA is not seeking to take charge of the prosecution as submitted by advocate for the accused. If I get its argument correctly, it is merely saying that the intended *nolle prosequi* fails the test that is set out under Article 157(II) of the Constitution. That having recommended the prosecution of the accused, and that recommendation having been acted upon by the DPP, then it is against the interest of the administration of to now seek to terminate the proceedings against the accused. That the views of the victim have been totally ignored.
49. In other words, IPOA is merely asking the court to bear in mind that it has investigated the case independently and having taken account of several witnesses statements it found that there was sufficient evidence to have the accused charged. In short, IPOA is acting for and on behalf of the victim who is now deceased.

50. In my view, IPOA is justified in seeking consideration of its position since the victim cannot speak for himself now that he is deceased.
51. It is apparent that when the DPP made the decision to charge the accused, it was fully aware of the recommendations by IPOA. The DPP was also fully aware of the decision in the inquest file.
52. As such, there are eyebrows raised when the DPP now comes to court and cites the said inquest file as the reason for the *nolle prosequi*. The message passed by the DPP is that one officer found that there was sufficient evidence to charge the accused while another officer, looking at the same evidence, now decides that the evidence is not sufficient.
53. In my view, this is where the transparency, objectivity and purpose of the intended *nolle prosequi* is put into question.
54. In my view, allowing the *nolle prosequi* would not be in the interest of the administration of justice from the prospective of the victim.

55. Even though the ruling in the inquest file was delivered, it is settled law that the same is not binding on the DPP. Thus, the DPP was in order to proceed to prosecute the accused, despite the outcome of the inquest.
56. There has been a running debate on whether the manner inquests are conducted in Kenya serves any meaningful purpose. The relevant provisions regarding inquests are to be found under sections 387 to 388 of the Criminal Procedure Code. They provide as follows:

387. Inquiry by magistrate into cause of death

(1)When a person dies while in the custody of the police, or of a prison officer, or in a prison, the nearest magistrate empowered to hold inquests shall, and in any other case mentioned in section 386(1) a magistrate so empowered may, but shall in the case of a missing person believed to be dead, hold an inquiry into the cause of death, either instead of or in addition to the investigation held by the

police or prison officer, and if he does so he shall have all the powers in conducting it which he would have in holding an inquiry into an offence.(2)Whenever the magistrate considers it expedient to make an examination of the dead body of a person who has been already interred, in order to discover the cause of his death, the magistrate may cause the body to be disinterred and examined.(3)If before or at the termination of the inquiry the magistrate is of the opinion that the commission by some known person or persons of an offence has been disclosed, he shall issue a summons or warrant for his or their arrest, or take such other steps as may be necessary to secure his or their attendance to answer the charge; and on the attendance of the person or persons the magistrate shall commence

the inquiry *de novo* and shall proceed as if he had taken cognizance of an offence.

(4)If at the termination of the inquiry the magistrate is of the opinion that an offence has been committed by some person or persons unknown, he shall record his opinion and shall forthwith send a copy thereof to the Director of Public Prosecutions.(5)If at the termination of the inquiry the magistrate is of the opinion that no offence has been committed, he shall record his opinion accordingly.(6)In the case of an inquiry relating to a missing person believed to be dead the magistrate shall at the termination of the inquiry report the case together with his findings to the Director of Public Prosecutions and shall make recommendations as to whether or not the period regarding the presumption of death

provided for by section 118A of the Evidence Act (Cap. 80) should be reduced and if so what lesser period should, in the circumstances of the death, be substituted for the period of seven years.

388. Powers of Director of Public Prosecutions as to inquiries into cause of death

(1)The Director of Public Prosecutions 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.(2)When an inquiry has been terminated under section 387, and it appears to the Director of Public Prosecutions that further investigation is necessary, the Director of Public Prosecutions may direct the magistrate to

reopen the inquiry and to make further investigation, and thereupon the magistrate shall have full power to reopen the inquiry and make further investigation and thereafter to proceed in the same manner as if the proceedings at the inquiry had not been terminated: Provided that the provisions of this subsection shall not apply to an inquiry at which a magistrate has recorded his opinion that the offence of murder or manslaughter has been committed by a person.(3)When giving any direction under this section, the Director of Public Prosecutions may also direct whether the body is to be disinterred and examined.(4)Upon receiving a report under section 387(6) the Director of Public Prosecutions shall after considering the recommendations of the magistrate direct him to make an

order as to the period which should be recorded before the death is presumed and upon the expiration of such period the Registrar-General shall be empowered on the production to him by the proper officer entitled to apply for and receive a grant of representation under the Law of Succession Act (Cap. 160), of a court certified copy of the magistrate's order, to issue to that person an appropriate certificate of death in accordance with the Births and Deaths Registration Act (Cap. 149).

57. One question that arises is whether the DPP has the power to direct a court/magistrate to hold an inquiry as provided under section 388. A court cannot be subject to direction by anyone, otherwise it would be in breach of Article 159 of the Constitution which provides for the independence of the Judiciary.

58. This case further highlights the concerns over the place of inquests in the present age. We all know that the inquest is prosecuted by the DPP. The witnesses are summoned by the DPP through the police. Would one expect a fair outcome to come out of the inquest that is premised upon allegations of violation of rights by the police? The jury is out there.
59. In my view, there is need to amend the law so that independent offices, like IPOA can be allowed to lead or participate in proceedings such as inquests that touch on allegations of violation of the law by the police.
60. This debate is not new. Justice W. M. Musyoka in **Manyibe and 4 Others vs DPP and 2 Others (2023) KEHC 2757 (KLR)** questioned the place of inquests under the Constitution. He stated as follows: -

“Either way, the inquest law, as it stands, belongs to a bygone era, and it is not in tune with current legal and constitutional dispensation, and it ought to be revised, to align it to current law and practice. The said law dates back to the colonial era, when the role of

magistrates was vastly different from what obtains today. The provisions were introduced in 1959, and need an overhaul. Magistrates played administrative and police roles then; and courts were largely a department in the office of the Attorney-General, and did the bidding of the Executive, which is not the case today. It will be noticed, for example, that section 388(1) talks of the Director of Public Prosecutions, who was also the Attorney-General then, directing the magistrate, which ought not to be the case, as magistrates do not serve under the Director of Public Prosecutions, and should not be directed by him in any manner. Magistrates courts should have no role at all in criminal investigations, for the roles spelt out in sections 386, 387 and 388 point to that. Criminal investigations, under *the Constitution, 2010*, is the exclusive role of the 1st and 2nd respondents, and the *Criminal Procedure Code* ought to be amended to align it

to the Constitution, 2010, to take away involvement of magistrates in criminal investigations.

Inquests are akin to the preliminary inquiries and committal proceedings that magistrates used to conduct in yesteryears, for the purpose of assessing whether there was evidence to support referring a murder or treason case to the High Court for trial. Those procedures were found to be duplicitous, for the accused would be subjected to 2 trials, one before the committing magistrate, and the other at the High Court, should he be committed there. Secondly, it also caused lengthy delays to completion of criminal proceedings for the offences in question.

Inquests have the same effect, duplicity and lengthy criminal proceedings. The 1st and 2nd respondents can do what the magistrate conducting the inquest does. The 2nd respondent carries out investigations, and where he forms an

opinion that there is evidence to sustain a trial and conviction, forwards the file to the 1st respondent for approval, and, where approval is given, prosecution. That is what a magistrate does in an inquest, carry out an inquiry or investigation, at the end of which he gives an opinion as to whether the evidence would sustain a conviction, and forward his opinion to the 1st respondent. The 1st respondent does the same, evaluate the report from the 1st respondent, or the magistrate where an inquest has been conducted, to assess whether or not to prosecute. That the 2 respondents can competently do, and certain classes of inquests or inquiries by magistrates should be done away with, in much the same way preliminary inquiries and committal proceedings were.

61. I could not agree more.

62. It is therefore time for all stakeholders to re-look at the law and make the necessary amendments so as to align it with

the Constitution. I can imagine the frustration that independent bodies like IPOA, and others face when the very people they are investigating are the same ones who conduct an inquest.

63. In the present case, the DPP was fully aware of the outcome of the outcome of the inquest file and still the accused charged with the offence of murder. The decision to now enter a *nolle prosequi* raises more questions than answers.
64. Ultimately, the family of the deceased need to know exactly what happened to him. If the circumstances exonerate the accused, then that will be the decision of the court but at least everyone will have had their day in court.
65. For the foregoing reasons, I am of the view that the interests of justice are best served if the matter proceeds to trial. That way, the question of the accused's culpability will be dealt with on merit.
66. That said, I reject the *nolle prosequi* and order that the case proceeds to trial.

**Signed, Dated and Delivered at Meru this 23rd day of April,
2026.**

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**H. M. NYAGA
JUDGE**