



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL CASE NO.E002 OF 2025

REPUBLIC-----
APPLICANT

-VERSUS-

JOHN KIMANI MUTURI-----
RESPONDENT

RULING

1. The Accused faces the capital charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence state that on 25th October, 2024 at Chagra Canteen located at Githioro Police Station, Nakuru North Sub-County, he murdered **Morris Gachanja Gathiru**. The Accused pleaded not guilty to the charge.

2. Hearing of the case has never taken off because of failure by the Prosecution witnesses to turn up. On 25th November 2025, the prosecution Counsel (**Mr. Wakasyaka**) **presented** *Nolle Prosequi* dated 18th November, 2025 signed by a Senior Assistant Director of Public Prosecutions (**Tom Imbali**) who is the Regional Head, South and North Rift Region, on behalf of the Director of Public Prosecutions (“the DPP”). Counsel Imbali states in the *Nolle Prosequi* instrument;

“IN EXERCISE of powers conferred on the Director of Public Prosecution by Article 157 (6) of the Constitution of Kenya and under section 83 of the Criminal Procedure Code, I HEREBY enter NOLLE PROSEQUI and inform this Honourable Court that the Republic intends that the proceedings against; JOHN KIMANI MUTURI who is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code SHALL NOT CONTINUE.”

3. The Defence Counsel (**Mr. Ndichu**) did not oppose the Application. By Ruling delivered on 4th December 2025 the court rejected the *nolle prosequi* for reasons that the provisions of **Article 157(11) of the Constitution** *supra*

requiring that the public interest; the interests of administration of justice and the need to ensure that there is no abuse of the court process be demonstrated to have been considered, was not shown to have been complied with. The court further observed that the Prosecution failed to inform the court that the views of the deceased's family were sought before seeking termination of the case. A conclusion was thus reached that the constitutional and legal threshold for termination of a criminal charge was not met and the Application was found to be premature in the circumstances.

4. The Prosecution did not give up and brought a similar Application by means of a Notice of Motion dated 23rd February 2026 for orders as hereunder;

1) Review, variation and/or setting aside of the court's orders of 4th December 2025 disallowing the DPP's *nolle prosequi*.

2) That the court does uphold the constitutional mandate of the DPP under Article 157 of the constitution and allow discontinuance of the proceedings.

3) That the court may issue any other orders deemed fit and just.

5. Mr. Daniel Wakasyaka (Prosecution Counsel) swore an affidavit in support of the Motion underscoring the DPP's power to discontinue criminal proceedings under **Article 157 of the Constitution**. Counsel states that their review of the file revealed material inconsistencies in the evidence and /or evidentiary gaps. Witnesses are also said to be unavailable. Mr Wakasyaka further states *inter alia* that the families of the deceased and Accused met up on 13/4/2025 and resolved to reconcile. The deceased's family subsequently decided not to continue with the case before the court and have no objection to withdrawal of the charge.
6. Mr. Wakasyaka exhibits minutes of the two families' meeting showing resolutions in this regard. The records include an affidavit purportedly sworn by the deceased's brother (Charles Gikandi Gathiru).
7. Withdrawal of the charge is therefore in the public interest and serves to avoid waste of judicial time, misuse of public resources and exposure of the Accused to unnecessary hardship due to lack of sufficient evidentiary foundation, adds Counsel.

8. According to Counsel, the *nolle prosequi* that had been entered was not actuated by *malafides*, corruption, political influence or other improper considerations. It is added that there is no evidence that the DPP's decision is illegal, procedurally improper or otherwise tainted with *malafides*.
9. Again the defence does not object to the Application. No submissions were made by the parties.
10. I shall restate the court's earlier analysis of the matter.

Article 157 (6) of the Constitution is in the following terms;

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

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by

another person or authority, with the permission of the person or authority; and

(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).

(7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution's case, the defendant shall be acquitted.

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

11. **Section 82 of the Criminal Procedure Code** under the Application is also brought provides for;

“Power of Director of Public Prosecutions to enter *nolle prosequi*.

(1) In any criminal case and at any stage thereof before verdict or judgment, as the case may be, the Director of Public Prosecutions may enter a *nolle prosequi*, either by stating in court or by informing

the court in writing that the Republic intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the *nolle prosequi* is entered, and if he has been committed to prison shall be released, or if on bail his recognizances shall be discharged; but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.

(2) If the accused is not before the court when a *nolle prosequi* is entered, the registrar or clerk of the court shall forthwith cause notice in writing of the entry of the *nolle prosequi* to be given to the keeper of the prison in which the accused may be detained.”

12. Article 157 (11) of the Constitution enacts;

“that in exercising the powers conferred by the Article, the Director of Public Prosecution shall have regard to the public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process.”

13. **Section 23** of the **Victim's Protection Act** requires that the opinion of the victim of the offence ought to be sought before the Director of Public Prosecutor (DPP) exercises his discretion to terminate a case. The law does not, however state that the victim's views must be adhered to.

14. In **Republic vs Nyalandi, Criminal Revision 524 of 2020 (2023) KEHC 1063, KLR (Criminal) (19 January 2023) (Ruling)** it was opined that to determine if the threshold set in **Article 157 (11)** of the Constitution has been complied with, the court shall consider the following *inter alia*;

- a) **Whether the Application is brought in good faith.**
- b) **Whether the society has a stake in the matter in issue.**
- c) **Whether the Accused will suffer prejudice if the Application is allowed or denied.**
- d) **Whether reasons in support of the Application are reasonable, sufficient and for adequate.**

e) **Whether there has been inordinate delay in making the Application for withdrawal of the case**

f) **The sentiments of the Respondent to the Application.**

15. As held in **Republic vs Sarah Wairimu (2019) KEHC**

11946 (KLR); the court shall intervene in an Application to enter *nolle prosequi* where it is shown that the DPP abused discretion, or exercised it for improper purposes or where there is failure to exercise statutory discretion.

This holding is approved in **Seenoi Ene Parsimei Esho Sisiria & 8 Others vs Attorney General (2013) eKLR.**

16. There is no doubt pursuant to **Article 157 (11)** of the **Constitution** *supra* and **Section 25 (1)** the **Office of the Director of Public Prosecutions Act** that the DPP is obligated to seek permission of the court to discontinue any criminal proceedings. This constitutional edict overrides the DPP's power to enter *nolle prosequi* by dint of **section 82(1) of the Criminal Procedure Code** *supra*. The issue for determination is whether the DPP has now satisfied the provisions of **Article 157(11)**

of the Constitution so as to warrant review of the court's earlier order rejecting termination or discontinuance of these proceedings as desired.

17. The court is told that witnesses are unavailable or unwilling to testify. The deceased's family is said to have resolved not to pursue the case. Strangely, none from the family appeared in court to convey the decision. Even an advocate called Mr. Guto the family sent to the court on 22/1/2026 to represent them has not appeared to state their position on the latest DPP's Application.

18. This observation notwithstanding, it seems evident that witnesses are unwilling to testify, perhaps because of the stance the deceased's family appears to have taken. Considering the other reasons for discontinuation of the case given by the DPP said to hamstring them, I find that the constitutional and legal threshold for termination of the case has been satisfied.

19. The Application is allowed and the Accused is discharged. Any bond security deposited into court be released to the owner.

J. M. NANG'EA, JUDGE.

**Judgement dated, signed and delivered virtually at Nakuru
this 7th day of May, 2026.**

In the presence of:

Mr. Wakasyaka for the DPP.

Mr. Ndichu Advocate for the Accused.

The Accused.

The Court Assistant - Jeniffer

J. M. NANG'EA, JUDGE.

Original