REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

MISC CRIM APPLI 20 OF 2006

EZEKIEL MUCHESI…..……..APPLICANT

V E R S U S

REPUBLIC……..……...RESPONDENT

RULING

EZEKIEL MUCHESI, the applicant herein, is the accused in Criminal Case No.2135 of 2004 pending in Kakamega Chief Magistrate Court in which he was charged with two counts one of *"office breaking and committing a felony contrary to section 306 of the Penal Code"* and the other of *"neglect to prevent a felony contrary to section 392 of the Penal Code"* to which he pleaded not guilty.

The plea was taken on 25.8.04 when the hearing was fixed on 23.11.2004. It was adjourned on that day. Thereafter, the case was adjourned severally and was eventually heard on different dates between 8.6.2005 and 24.4.06 after which the prosecution sought further adjournment. When the prosecution again sought adjournment on 24.4.06, it was opposed by the defence. The trial court ordered the hearing to proceed but on 31.05.06 when it came up again for hearing the prosecution presented a *nolle prosequi* dated 30.5.06 which gave rise to the application dated 2nd June, 2006 by the Applicant seeking, inter alia, an order that the said *nolle prosequi* be declared null and void and for an order that the trial magistrate be directed to reject it and proceed to determine the said criminal case in accordance with the law.

The application was premised on the grounds that the Attorney General's action in presenting the *nolle prosequi* was in bad faith, unfair, and against public interest and that it amounted to abuse of the process of the court. The application was supported by an affidavit sworn on 2-6-2006 by the applicant. The Respondent, the Republic of Kenya

not file any replying affidavit to rebut any of the allegations made by the Applicant which included the following, namely, that

(i) the applicant was arrested on 15.8.2004 and placed in custody for two weeks

(ii) the applicant was charged on 25.8.2004

(iii) the prosecution was not keen in prosecuting the case

(iv) the trial court granted what was referred to as the last adjournment on 12.5.05

(v) on 23.2.2005 the prosecution applied for adjournment on the grounds that it intended to prefer further charges and substitute the charge sheet

(vi) the case proceeded again to hearing on 8.6.05 and was adjourned for further hearing on 20.7.2005

(vii) the 4th and 3rd prosecution witnesses testified on 5.12.2005 and the case was adjourned to 1.2.2006 at the behest of the prosecution

(viii) on 1.2.2006 the prosecution applied for adjournment which was granted and the case fixed for hearing on 15.2.2006

(ix) on 15.2.2006 the prosecution had no witness and as a result it sought adjournment which was granted and the case was stood over to 13.3.06 for hearing

(x) on 13.3.06 the prosecution did not have witnesses and therefore sought adjournment yet again and the court granted the "last adjournment"

(xi) on 24.4.06 the prosecution called PW8 and then sought an adjournment which the trial court granted as "the last adjournment."

(xii) *On 31.5.06 the case came up for hearing again when the prosecution presented nolle prosequi dated 30.5.06.*

The record shows that on 31.5.06 the prosecutor told the trial court that he had instructions to enter ***nolle prosequi.*** No reasons were given for the ***nolle prosequi***.

When the application in this matter came up for hearing before me on 13.6.2006, Mr. Fwaya, learned counsel for the applicant, contended that the ***nolle prosequi*** was not presented in good faith and that it amounted to abuse of the process of the court because, he said, the reason for it was the prosecutor's inability to get crucial witnesses. It was Mr. Fwaya's contention that the ***nolle prosequi*** was intended to defeat the trial court's likely refusal to grant the prosecution a further adjournment and that it was unfair, in bad faith and not in public interest.

Mrs. Kithaka, learned Senior Principal State Counsel who represented the Republic, opposed the application and contended that the Attorney General (AG) was entitled under the law to enter the ***nolle prosequi*** as he did without consulting anybody and that there were reasons which could not be disclosed and that the AG was in any case not obligated to disclose them. The ***Nolle prosequi***, said Mrs. Kithaka, was in good faith as the prosecution had presented 8 witnesses but could not trace crucial witnesses in the limited time.

Although Mrs. Kithaka did not file a replying affidavit, the record of the proceedings showing how the case in the trial court was conducted speaks for itself.

Under section 26 (3) (c) of the Constitution, the AG has power in any case in which he considers it desirable so to do, to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority under section 26 (4). The power of the AG under s. 26 (3) and in particular s. 26 (3) (c) may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions. It is clearly stipulated in section 26 (8) of the Constitution that the AG shall not be subject to the direction or control

of any other person or authority.

The power of the AG to enter *nolle prosequi* is pre-eminent amongst the prerogative powers exercised by him as the principal adviser to the Government (see s. 26 (2) of the Constitution). His power to take over and continue any criminal proceedings and to discontinue any criminal proceedings at any stage before judgment epitomizes the magnitude of the discretionary power vested in the AG. This power is intended to effectively maintain control over criminal cases involving the citizenry with the object of ensuring that the rule of law is upheld and public interest and the welfare of the society is safeguarded. Section 26 (3) and (3) (c) of the Constitution stipulate-

26(3) ***The Attorney General shall have power in any case in which he considers it desirable so to do*** -

26 (3) (c) *to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or under-taken by himself or another person or authority.*

Section 82 (1) of the Criminal Procedure Code stipulates:-

In any criminal case and at any stage thereof before verdict or judgment, as the case may be, the Attorney-General may enter 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 recognizance 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.*

The power of the AG under s. 26 (3) (c) of the Constitution is discretionary. It cannot be challenged. But the exercise of that discretionary power can be challenged if it is used improperly, or in bad faith, or oppressively, or capriciously or against public interest. It can be challenged also where it is an abuse of the process of the court. It is precisely because the AG's power is discretionary that its exercise is liable to censure.

After conferring on this court in section 60 (1) unlimited original jurisdiction in Civil and Criminal matters, the Constitution proceeds to vest in this Court under section 123 (8) supervisory jurisdiction in relation to any question whether any person, (including the AG.), or authority has exercised any functions in accordance with the Constitution or any other law. Sections 60 (1) and 123 (8) of the Constitution are in these terms

60 (1) *There shall be a High Court, which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.*

123 (8) *No provision of this Constitution that a person or authority shall not be subject to the direction or control of any other or authority in the exercise of any function under this Constitution shall be construed as precluding court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law.*

This court has held in the past that the exercise by the AG of his discretionary power to enter *nolle prosequi* under section 82 (1) of the Criminal Procedure Code, Cap 75 and s. 26 (3) of the Constitution is subject to the supervision of this court under s. 123 (8) of the Constitution. The exercise by the AG of

this discretionary power under these sections to enter nolle prosequi is required to be in good faith and in public interest. In Billy Elias Nyonje v. Republic Kakamega H.C. MISC. CR. APPL. NO. 34 OF 2002 this court pointed out that "both the letter and the spirit of the Constitution demonstrate that the fundamental rights and freedoms of the individual enshrined in Chapter V of the Constitution which include the right to fair trial within a reasonable time (see s. 77[1] of the Constitution) are designed to be protected by this court in its supervisory and original jurisdiction. In the exercise of his discretionary power to enter *nolle prosequi* the AG must not therefore act in bad faith or oppressively or capriciously or against public interest. Where he does so, this court is enjoined to step in and intervene in its supervisory role under s. 123 (8) of the Constitution to stop the improper use or exercise of such power. As pointed in *Billy Ellias Nyonge v. R (supra*), where the prosecution of a case has progressed substantially, the AG ought to proffer reasons for entering *nolle prosequi* to dispel the perception among the public that the exercise of his power to enter *nolle prosequi* is actuated by improper motive. *"In absence of such reasons, it cannot be assumed that he had any, much less that he had legitimate reasons…." (see* Billy Ellias Nyonge v. R [supra])

In the instant case, the prosecution of the case had proceeded substantially. The prosecutor repeatedly sought adjournments whenever he was unable to present witnesses and eventually when the trial court appeared intent on refusing any further adjournment and required the prosecutor to proceed with the prosecution of the case on 31.5.06 the prosecutor tendered a ***nolle prosequi***.

Clearly the ***nolle prosequi*** was entered to defeat the court's likely refusal to grant adjournment which would have resulted in the prosecution having to close its case. That is not the purpose for which the power to enter ***nolle prosequi*** was intended. That was abuse of the discretionary power. The fact that the AG is not enjoined to proffer reasons for entering ***nolle prosequi*** and the absence of such reasons cannot stop the court from inferring from the material on record before it whether the AG was motivated by bad faith or whether the action was designed to defeat the cause of justice or amounted to abuse of the process of the court.

Mrs. Kithaka did in her submission to this court state that, the trial had proceeded substantially as 8 witnesses had already given evidence. Perhaps for this reason the State should have given reasons why the ***nolle prosequi*** was being entered. In the absence of such reasons, the court is entitled to infer from the facts and evidence emerging from the record whether the ***nolle prosequi*** was in good faith and for public good.

It was ostensible from the record that the prosecution was unable to get its crucial witnesses although the hearing had started in 2004 and continued to May, 2006. The trial court fairly gave adjournments, and exercised a lot of latitude. Clearly the applicant was entitled to a fair hearing within a reasonable time and the intention of the prosecution to procrastinate the hearing further or to withdraw it and possibly revive it again by charging the applicant anew could not be said to be in the interest of promoting the rule of law or fair trial within a reasonable time. It is my finding that the ostensible reason why the ***nolle prosequi*** was tendered was because the trial court was unlikely to grant a further adjournment. That was not a proper exercise of the discretionary power. It was not in good faith. Where there is improper exercise by the AG of his discretionary power to enter ***nolle prosequi,*** this court is entitled to censure such improper exercise of the power. It is my finding in this case that the exercise by the AG of his discretionary power under s.82 (1) of the Criminal Procedure Code Cap 75 was improper not least because it was not only not in good faith but also because it was an abuse of the process of the court to the extent to which it sought to inhibit finalization of the case after repeated adjournments. Improper exercise of the said power by the AG clearly was not going to promote the rule of law or ensure that the applicant's constitutional right to a fair trial within a reasonable time was not abrogated.

I am satisfied that the applicant has discharge his burden of proving that the exercise by the AG of the power to enter ***nolle prosequi*** was improper. I declare the exercise by the AG of his power to enter ***nolle prosequi*** improper and hold that the ***nolle prosequi*** tendered pursuant to such improper exercise of the power was bad in law and therefore liable to be rejected.

The trial court shall proceed to hear and determine Criminal Case No.2135/04 in accordance with the law.

Each party shall bear its own costs.

Dated at Kakamega this 6th day of December.2006

G. B. M. KARIUKI

J U D G E