REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Criminal Revision 190 of 2009

PAUL NDUNDA MAKAU

ANN WANGUI WABERERE ………………….APPLICANTS

VERSUS

REPUBLIC …………………………………….RESPONDENT

RULING

This file has been placed before me requesting me to call for revision in Malindi Principal Magistrate's Court Criminal Case No. 1612 of 2008 Republic v Paul Ndunda Makau and Ann Wangui Waberere, following a letter dated 23rd July 2009 written by the firm of Khaminwa and Khaminwa (Advocates for the accuseds) to the Deputy Registrar.

The request is that this court examines the record to satisfy itself as to the legality, or propriety of the order recorded on 29th May 2009, and as to the regularity of the proceedings of that day, in particular, the legality and regularity of the entry of the Nolle Prosequi on the following grounds:

1) That the case was due for ruling on 29th May 2009 as to whether accuseds had a case to answer or not.

2) The Nolle Prosequi was presented to arrest the delivery of the ruling, which was improper.

3) The Nolle Prosequi was intended to embarrass the court – which it did

4) The Nolle Prosequi was irregularly procured and presented to court in bad faith.

5) The presentation of the Nolle Prosequi on the day of the ruling was an implicit admission that there was no case to answer.

6) The presentation of the Nolle Prosequi prejudiced and embarrassed the accused and the defence counsel who were not even accorded an opportunity to make representation or submissions before the court accepted the Nolle Prosequi.

7) Consequently the proceedings were illegal, improper and irregular and warrants intervention by the High Court on revision to regularize and correct the error.

8) The prejudice to the accused is that the discharge does not terminate the charges

9) The complaint goes against the conduct of the prosecution. Counsel for the 1st accused who conducted the case was not in court on 29-5-09 to raise objections as he was indisposed.

I have read through the lower court's original record. The prosecution had closed its case after presenting the testimonies of six witnesses, counsel for the accuseds made submissions and the trial magistrate reserved the ruling for 29-5-09.

However on 29-5-09 the State entered a Nolle prosequi. Was this irregular"

Under section 26(3) (c) of the Constitution of Kenya:-

"The Attorney General shall have in any case 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."

This provision is fortified by section 82(1) of the Criminal Procedure Code which provides that:-

"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,…but discharge of an accused person shall not

operate as a bar to subsequent proceedings against him on account of the same facts."

A reading of that provision seems to suggest that there need not be stated in court the reason for entering the Nolle Prosequi. The problem with that is that (a) the accused is left in limbo not knowing when the State can pounce on him and charge him with the same offence again – there is an air of eternal uncertainty created by the discharge and questions must abound in the minds of an accused person as to why Nolle Prosequi has been preferred – did the State suddenly realize it had a poor case" Does the State intend to patch up whatever loopholes it may have noticed in the case during cross-examination and submissions, then charge the accused afresh" Nolle Proseqi from the tenor of the letter by accused's advocate, steals the thunder from the defence team.

So can this court revise the order, lift the Nolle prosequi and direct that the case proceeds from where it had reached"

In the case of **Gregory and Another v Republic thro' Noltingham and 2 others** it was held inter alia that the Attorney General's discretion to terminate proceedings is constitutional. The accused's counsel urges this court to consider whether the Attorney General's exercise of discretion to enter Nolle Prosequi meets the test of constitutionality by virtue of section 123(8) of the Constitution which recognizes the court's jurisdiction to question whether a person or authority has exercised its functions in accordance with the constitution of Kenya or any other law. This court can therefore inquire whether the power which is vested in the Attorney General of presenting the nolle prosequi has been exercised within the constitution.

It is trite law, that a sub-ordinate court's jurisdiction, once nolle prosequi has been entered under section 82 of the Criminal Procedure Code, subject only to entry of judgment or a verdict in the case, is limited to recording the entry of nolle prosequi and to acting upon it by immediately discharging the accused person, the proceedings stand terminated and the subordinate court's jurisdiction immediately ceases. I here, I heavily borrow from the decision **Otieno Clifford Richard v R (2006) e KLR** also filed as Misc. Civil suit 720 of 2005 (High Court Nairobi), that:-

"it is only the High Court which has both the constitutional and inherent powers to question the entry of nolle prosequi and to oversee the proper exercise by the Attorney General, in the management of the prosecution powers.

The subordinate court therefore lacked any jurisdiction to make any comments of any nature upon entry of the nolle prosequi by the Attorney General or to express any misgivings, emotions or views as to the entry of nolle prosequi. The attorney General was not obliged to give any reasons for the entry of nolle prosequi to the subordinate court"

To that extent then, what the trial magistrate did i.e by accepting the entry of nolle prosequi and discharging the accused was proper – neither the accuseds, nor their advocates had any right to be heard in answer to the entry of the nolle prosequi made in the subordinate court.

Now then having recognized the limitations in the lower court, my duty as the High Court is to inquire into reason for the

entry of the nolle prosequi so as to stem any abuses of that function by the Attorney General. To that extent then, I called for submissions by both the State Counsel and the defence counsel before ruling on the matter.

In this regard, Mr. Ogoti submitted on behalf of the State that the Nolle Prosequi was presented procedurally and the applicant/accuseds, had an opportunity to object on the entry and have the matter referred to the High Court, but they did not and those proceedings were terminated and at this stage the same have been overtaken by events. Mr. Ogoti asked the court to consider the case of **Veronicah Nderi Karua v R Misc. Cr. Application No. 29 of 2005 (Kakamega)** which recognized that Nolle Prosequi is exercised in good faith and be likewise guided.

Mr. Ogoti is of the view that there should have been a formal application filed then the State would be able to explain why nolle prosequi was entered, by way of affidavit – he has referred to the case of **Philemon Musembi v R Misc. Cr. App. No. 50 of 2005** which demonstrates that any constitutional issue can only be brought to court under section 67(1) and 84 of the Constitution.

In response, Mr. Thiongo for the accuseds submits that Revision is a discretionary remedy and a party who has a right of appeal cannot come for revision but in the present case the proceedings were terminated and accused discharged and so has no right of appeal except to come by ay of revision. Whilst acknowledging the position enunciated in **Philemon Musembi's case**, he argues that revision or reference are also options an individual can use to access the High Court for redress. He reiterates that in this case, the prosecution called all the evidence up to the last witness and the matter was coming up for ruling, so he only purpose of the nolle prosequ was to stop the ruling being delivered and to forestall the imminent acquittal of the accuseds and must be seen as being made mal fides.

He urges this court to adopt the position taken by the judges in **Aden Keynan Webliye v R cr.c 223 of 2003** where a constitutional bench of three judges held that the court can inquire on whether nolle has been exercised within the constitution and so when the High Court is exercising its inherent right, it need not write a letter or direct for filing of an application. I agree. There is no useful purpose served in being secretive about the entry of the nolle, and Mr. Ogoti must stop playing musical chairs by suggesting that he can only disclose the reason for entering of the nolle, if a formal application is made, and that such reasons can only be by way of an affidavit. To this I would say, away with technicalities, whether the reasons are stated in an affidavit, or in an oral address to the court, the bottom line would be that the air will have been cleared as to why the nolle prosequi was entered.

The case of **Ezekiel Muchesi v R Misc. Cr. App. No. 20 of 2006** addressed a situation somewhat similar to the present instance. The judge in that case recognized that the power of the Attorney General to enter nolle prosequi is pre-eminent amongst the prerogative powers exercised by him as the principal adviser to the Government. 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. Although section 26(3) (c) of the Constitution gives the Attorney General discretionary power, exercise of that discretion can be challenged if it is used

improperly or in bad faith or capriciously and this fits in well with the provisions of section 123(8) of the Constitution to that effect and this is what was considered in the case of **Billy Elias Nyonje v R Kakamega High Court Miscllenaous Criminal Application No. 34 of 2002** which pointed out that where the prosecution of a case has progressed substantially, the Attorney General 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 and stated that:

"In the absence of such reasons, it cannot be assumed that he had any, much less that he had legitimate reasons…"

In the instant case, the State has decided to play everything close to its chest, even after being called upon by this court to disclose reasons for entering the nolle prosequi, the Counsel for the State has opted for the technical lyrics – so what other inference can a reasonable person draw from a situation where prosecution had closed its case and was awaiting ruling by the court – it can only be inferred that there was such bad motive that, the State is even embaraased to disclose the same and that the action was designed to defeat the cause of justice.

There must be an end to what amounts to an oppressive practice of arraigning persons in court where there is no evidence or insufficient evidence and when the prosecution finds itself in a tight spot, it simply flashes the trump card in form of entering a nolle prosequi and to quote from my colleagues in **Adan Keynan Wehilye v R case**:

"To allow such practice to take root, the court would in our (my) view, be abdicating its responsibilities as the custodian of the fundamental rights of the individual as enshrined in the Constitution."

The State in my view has acted capriciously and oppressively in presenting the nolle prosequi when the trial was about to come to an end.

My finding therefore is that the nolle prosequi dated 19th May 2009 is invalid and oppressive and I declare the same null and void and of no legal consequence and the order dated 29th May 2009 is likewise null and void.

The matter shall resume from where it had halted and the trial court shall proceed to hear and determine criminal case No. 1612 of 2008 (Malindi) in accordance with the legal provisions.

Delivered and dated this **14th** day of **December 2009** at Malindi.

H. A. OMONDI

JUDGE

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