**UNIVERSITY OF NAIROBI**

**SCHOOL OF LAW**

**MASTER OF LAWS (LLM)**

**THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS OF THE UNIVERSITY OF NAIROBI**

**TOPIC:**

# *NOLLE PROSEQUI*: AN ANALYSIS OF ITS PRACTICAL APPLICATION IN KENYA UNDER THE CONSTITUTION OF KENYA 2010.

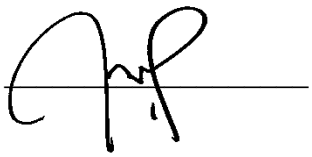
**KEMBOY JULIUS KIPKOSGEI**

**G62/8039/2001**

**December, 2021**

## DECLARATION

This Thesis is my original work and has never been presented for a degree in any other University.

Signed  Date**1st December, 2021**

KEMBOY JULIUS KIPKOSGEI

G62/8039/2001

## DECLARATION BY SUPERVISOR.

This Thesis has been submitted for examination with my approval as the university supervisor.

Signed ___ DR. SCHOLASTICA OMONDI_____ Date_7th December 2021

RAI VYAS YASHWANT (Deceased)

Signed on His Behalf By

DR. SCHOLASTICA OMONDI

## DEDICATION

Until early 2000, Kenya's political space was highly repressive. It is during this period that the State machinery through the Attorney General deployed the power of *nolle prosequi* against various accused persons in an oppressive and cavalier manner. So pervasive was the might of the political class that even the judiciary, the custodians of the rule of law, became a willing accomplice in this wanton violation of the rights of an accused person. It was a dark era.

I dedicate this thesis to the many Kenyans who found the courage, at great personal risk and liberty, to continuously question the *bona fides* of the power of *Nolle Prosequi* whenever it was exercised by the Attorney General; to those who endured untold hardship and suffering as they took on the might of the State in challenging the propriety of its application; and to the rare judicial officers who refused to turn a blind eye to the injustice that was wrought by the unrestrained acts of the Attorney General. To all of them collectively, you inspired me to write about it and in so doing you have perchance made a lasting contribution in the richness of learning.

**ACKNOWLEDGEMENTS**

The journey has been long. But God has been kind and merciful. To Him I dedicate eternal glory and praise.

A work of this nature is a crowning of diverse contributions. While I cannot single out each one of you by name, allow me to thank you most sincerely for the criticisms, the comments and sometimes that encouragement that enabled me complete this project.

The staff at the Criminal Registries in the Judiciary of Kenya were of immense help in gathering various court records that I have relied on in the study. Without your immeasurable assistance, this would have been an impossible task. Colleagues in the legal practice too deserve a mention for the useful leads in following up on certain Court decisions that sometimes eluded my own memory.

I owe a debt of gratitude to my Supervisor, Yash Vyas, for his untiring guidance and commitment in nudging me towards completing this task. It was a good fight – entirely worth the effort. I will always treasure his patience and encouragement. His untimely demise meant that he could not be here to crown his mentorship. In the end, Dr Scholastica Omondi made useful suggestions on the overall theme of the work. Her interventions have definitely enriched the final product. The Graduate School has remained supportive and sympathetic. Thank you for the opportunity to complete this work.

And to my dearest Dorine. This is for you.

## INDEX OF CASES

*Gregory & Another v Republic thro' Nottingham & 2 Others*, High Court at Nairobi [2004] 1 KLR.

*Kimani v Kihara* (1985) KLR 79.

*Klopfer v North Carolina* (1967) 386 U.S 213.

*Korematsu v U.S*, 584 F.Supp. 1406, 16 Fed. R. Evid. Serv. 1231 (N.D.Cal. Apr 19, 1984).

*Linda R.S. v Richard* D 410 U.S. 614, 619 (1973).

*Mwangi and Seven Others v Attorney General* [2002] 2 KLR 713

*Mwau v Republic* [1985] KLR 748 CA.

*North Western Dense Concrete CC v Director of Public Prosecutions Western Cape* 2000 (2) SA 78 (C).

*Odinga v Saitoti and others* (1995) LLR 1163 (HCK).

*Otieno Richard Clifford v Republic*, [2006] eKLR.

*Queen v Allen*, 1 B & S. 850.

*R v Comptroller-General of Patents* (1899) 1 QB 909.

*R v Dunn*, 1 Car &Kir 730.

*R v Enock Wekesa and Michael B. Watah* (Unreported) Misc. Criminal Revision No. 267 of 2010

*R v Sikumba* [1955] 3 S. A. 125.

*R v Wilkes* (1768) 98 ER 327.

*R v William Rongurwa Ole Ntimama*(Unreported) Criminal Revision No. 23 of 1995.

*Re: Kisumu Muslim Association* (Unreported) Kisumu HC Misc. Application No. 280 of 2003.

*Regina v Alien IX Cox* C. *C.* 120

*Republic v Crispus Karanja Njogu* (Unreported) Criminal Case No. 707 of 1998.

*Republic v DPP, Chief Magistrates Law Courts Nakuru, Cyrus Cheboi (Subject) and Samuel Ngige (Interested Party)* [2012] eKLR.

*Republic v Enock Wekesa and Michael B. Watah* [2010] eKLR.

*Republic v Minister for Home Affairs and Others ex ParteSitamze*[2008] 2 EA 323.

*Republic v Wicklife Otieno Ngode Alia Toti and Tobias Odhiambo Otieno* [2011] eKLR.

*Roy Richard Elirema and Vincent Joseph Kessy v Republic* Criminal [2003] eKLR.

*Rupert Nderitu and Others versus Republic* (Unreported) Criminal Appeal No. 319 of 1985

*Sabur v R* (1958) EA 126.

*SeenoiEneParsimeiEshoSisina (Suing On Her Behalf and on Behalf of Her Children) and Eight Others v Attorney Genera* (Unreported) High Court of Kenya at Nakuru, Miscellaneous Civil Case No. 345 Of 2005 (O.S).

*The Queen, on the Prosecution of Tomlinson v The Comptroller-General of Patents, Designs, and Trade Marks* (1899) 1 Q.B., 909.

*The State v S.O Ilori& Others* 1983 N.L.R.

*United States v Brokaw* 60 F.Supp. 100 (S.D.Ill.1945).

*United States v Cowan & another*, 524 F. 2d 504.

*United States v Krakowitz* 52 F.Supp. 774 (1943).

*United States v Shoemaker*, 27 F.Cas. 1066 (C.C.D.Ill.1840) (No. 16,279).

*Veronica NjeriKiarie v Republic* (2005) eKLR.

*William Bucolo et al v James Adkins*, Chief Justice, et al, 424 U.S. 641, 96 S.Ct. 1086, 47 L.Ed.2d 301 (1976).

## INDEX OF STATUTES

**KENYAN LAWS/STATUTES:**

The Constitution of Kenya, 2010.

The Constitution of Kenya, 1969 (now repealed).

The Penal Code, Chapter 63 of the Laws of Kenya.

The Criminal Procedure Code, Chapter 75 Laws of Kenya.

The Office of the Director of Public Prosecutions Act, Act No. 2 of 2013 of the Laws of Kenya.

The Office of the Attorney General Act, Act No. 49 of 2012 of the Laws of Kenya.

**KENYAN RULES AND REGULATIONS:**

Code of Conduct & Ethics for Public Prosecutors (2013).

**SOUTH AFRICA LAWS/STATUTES:**

The Constitution of the Republic of South Africa.

National Prosecuting Authorities Act

The South African Criminal Procedure Code.

**UNITED STATES OF AMERICA STATUTES:**

Judiciary Act of 1789.

Louisiana Code of Criminal Procedure.

The Constitution of the United States of America.

United States, Act of September 24, 1789, ch. 20, 1 Stat. 73.

United States, Federal Rules on Criminal Procedure

## ABBREVIATIONS

**CA**- Court of Appeal (East Africa).

**EA**- East African Law Reports

**eKLR**- electronic Kenya Law Reports.

**ER-** English Reports.

**F. 2d**- Federal Reporter (Second Series) (US).

**F. Cas**- Federal Cases (US).

**F.Supp**- Federal Supplement (US).

**Fed. R. Evid. Serv**-*Federal* Rules of *Evidence Service.*

**HC**- High Court (Kenya).

**KLR**- Kenya Law Reports.

**Misc. App**- Miscellaneous Application.

**N.L.R**-National Law Review.

**O.S**- Originating Summons.

**QB**- Queen's Bench Reports.

**S.C.T**.- Solicitors Complaints Tribunal.

## ABSTRACT

The absolute and unfettered discretion of the Attorney General to *enter nolle prosequi* was a prerogative of the Crown under common law. This practice extended to British colonies. At independence, Kenya adopted this English tradition in its independence Constitution. However, its practical application in post-colonial Kenya led to numerous injustices arising largely from the improper termination of criminal cases. As a result, the public demand for constitutional reform necessarily included a demand for reform of these prosecutorial powers. As a result, the Kenyan Constitution of 2010 made significant reforms, stripping the Attorney General of all prosecutorial responsibilities and putting them in the Director of Public Prosecutions (the DPP). Furthermore, the Constitution mandated that, in exercising the modified *nolle prosequi*, the DPP shall consider the public interest, administrative law interests, and the need to prevent and avoid judicial process discrimination.

The postulation of this thesis is that despite the radical changes introduced by the Constitution of Kenya 2010, the exercise of the reformed *nolle prosequi* remains uncertain and ineffective because there are insufficient guidelines on how these broad principles ought to be applied in the exercise of the said powers. An analysis of the subsequent action by the DPP as well as ensuing judicial decisions reveal that the very abuse of this power is still rampant. The thesis therefore seeks to explore the efficacy of the afore-stated constitutional principles on the reformed *nolle prosequi*. It assesses whether the said principles are sufficient guarantees to the fair dispensation

of justice whenever *nolle prosequi* is invoked. Without attempting a comprehensive comparative study, the inquiry makes reference to best practices that can be adopted from other jurisdictions in order to achieve the intended reforms.

In order to effectively address the topic, the thesis commences by examining the historical application of *nolle prosequi* in Kenya under the old constitution. It then scrutinizes the pertinent clauses of Kenya's 2010 Constitutionin tandem with attendant legislations in order to ascertain the effectiveness of the reforms brought about by the new dispensation. It thereafter incorporates a limited comparative analysis of how similar prosecutorial powers are exercised under English law, Roman Dutch law and American federal law. In conclusion, the thesis contends that the aspirations that Kenyans yearned for in their quest to reform the exercise of *nolle prosequi* have not been fully realized and the laws, systems and steps taken by Kenya so far are insufficient to guarantee fairness and justice in the criminal justice system.

Ultimately this study will offer useful insight and propose reform agendas which if implemented will inform the exercise of *nolle prosequi* in future, thereby making a valid contribution towards the improvement of Kenya’s criminal law system.

# TABLE OF CONTENTS

## CHAPTER ONE: INTRODUCTION

### 1.1. BACKGROUND OF STUDY

*"As you might imagine, deciding when to prosecute is not an easy task. It is not necessary to file a criminal complaint in every case in which a law enforcement agent believes a conviction may be procured. There are times when prosecuting a case is unfavourable for public policy motives. Perhaps the prosecution will give him the opportunity to portray himself as a sacrificial lamb. Or maybe he's too sick to stand trial without jeopardising his wellness or even his life. All of these things are taken into account."*[1]

The authority of *nolle prosequi* is granted to prosecuting authorities in any country who, for a compelling cause, consider that dropping criminal proceedings against an accused individual in the pre-judgment process is in the best interests of justice. Once a nolle prosequi is entered, the proceedings should end, and the suspect should be released on the charge for which the nolle prosequi was made. However, a discharge does not bar the suspect from facing criminal charges based on the same facts in the future.[2]

At common law, the Attorney General (AG) was the only office with the power to exercise absolute discretion to enter a *nolle prosequi.*[3]As a matter of fact, even after a *nolle prosequi* is entered and duly accepted by the court, nothing would stop the AG from entering yet another

[1] Sir E. Jones 'The Office of the Attorney General' in Digest on Human Rights and Justice (*Cambridge Law Journal* in April 1969) 49.
[2]Criminal Procedure Code, Chapter 75 of the Laws of Kenya, section 82.
[3] Blackburn J. in *Reg. v Alien IX Cox* C. C. 120,123.

*nolle prosequi* in respect to fresh or further proceedings on the same indictment.[4]She can repeat this as many times as proceedings required.[5]

Kenya being a common law country, adopted similar provisions in its Criminal Procedure Code (CPC). Thus, the Kenyan CPC first published in the special issue of the 1929 Official Gazette of the Colony and Protectorate of Kenya provided under section 79 for the absolute power of the Kenyan AG to enter *nolle prosequi* at any stage before judgment. Just as it was under common law, the said withdrawal did not bar the institution of subsequent proceedings against the accused on account of the same facts.

Under this legal regime, the AG's power to enter *nolle prosequi* was absolute as he was granted an unfettered discretionary mandate that was not subject to any limitation. Thus, anytime the AG was dissatisfied with any criminal proceedings against any person, he would terminate those proceedings without ever having to demonstrate any justifiable reasons. Indeed, this is what happened in 1955 when the AG entered a *nolle prosequi* in the case where a white settler, Walter Wilkin, had shot and killed Mr. Wallace Gitagia.[6]

The Attorney General's office was founded under section 26 of the amended 1969 Constitution when the country gained sovereignty. The Attorney General's mandate at the time was to initiate and prosecute criminal cases on best interests of the Democratic nation. In this respect, the AG solely shouldered the responsibility of instituting, taking over, and continuing and/or discontinue criminal cases.[7] The wording of this Section of the repealed Constitution was such that it

[4] Ibid, 845.
[5]*The State v S.O Ilori&Ors S.C 1983 (NG).*
[6]John Kamau, "Why Kenya Is the Real Happy Valley" (*Business Daily* May 20, 2009). https://www.businessdailyafrica.com/analysis/539548-600694-bvrq37/index.htmlaccessed August 14, 2021.
[7] The 1969 Constitution, section 26(3).

conferred upon the AG the absolute discretion, when he so considered it 'desirable' to undertake and enter a *nolle prosequi* in any proceedings and in so doing, to do so without reference to any court.[8]Indeed, the repealed 1969 Constitution insulated the AG by decreeing that in the exercise of the functions vested in him, the AG would not be subject to the direction or control of any other person or authority. In effect, therefore, just as was in common law, independent Kenya's AG's power to institute and discontinue criminal proceedings was absolute and without any limitation. The AG was under no compulsion to consider the views of the accused person, the trial court or any other judicial officer, or even the executive in relation to the decision to institute or discontinue criminal proceedings.[9]

Perhaps the rationale for vesting these absolute powers in the AG lay in the principle that the AG was required to exercise his functions in the best interests of the State and the public. The underlying assumption was that in undertaking his prosecutorial powers, the AG would be guided by egalitarian principles which demanded fairness and justice. Most importantly, the AG was assumed to execute his prosecutorial mandate without being motivated by self-interest, favour, ill-will, or affection.[10]

However, these assumptions, taken into context, fall flat. There was a major conflict of interests due to the fact that the AG was a Presidential appointee who held office at the pleasure of the President.[11]In this sense and despite the very clear provisions of section 26 of the repealed 1969 Constitution, the AG was susceptible to pressure and manipulation from not only the President but any other person of influence (mostly other political leaders) acting at the behest or authority

[8] Ibid, section 26(6). See also, Vincent Kodongo, *Police Accountability in Kenya* (HRIO and IMLU 2006).
[9] *Githunguri -vs- Republic* Misc. Crim. App No. 180 of 1985 (unreported).
[10] Article 26(3) (c) Constitution of Kenya 1969 (repealed).
[11] Korwa Gombe Adar, 'The Internal and External Contexts of Human Rights Practice in Kenya: Daniel Arap Moi's Operational Code' Vol. 4 (*ASR* 2000) 74.

of the President.[12] It is no wonder, therefore, that the exercise of *nolle prosequi* was over the years tarnished by political considerations.[13]A case that readily springs to the fore is the 1995 case of *Odinga v Saitoti*.[14] This case was originally a private prosecution instituted by the then opposition politician, Raila Odinga, against the then country's Vice President, Prof. George Saitoti, for alleged crimes offending the CPC. Just before the case proceeded, the then Director of Public Prosecution (DPP), at the behest of the then AG, made an application to appear as *amicus curiae*. It so happens that soon thereafter; the DPP made an application to take over the prosecution of the case pursuant to section 26(3)(b) of the repealed1969 Constitution. No sooner had the application to take over and continue proceedings been allowed than the DPP made another application, this time to enter a *nolle prosequi* that had been drawn by the AG. The trial court duly entered the *nolle prosequi* and terminated the criminal proceedings.

Essentially, in allowing the said application, the trial court emphasized the absolute discretion enjoyed by the AG to discontinue any criminal proceedings before any court of law. Similar sentiments were echoed by the High Court when the propriety of the said *nolle prosequi* was challenged. It is not lost on anyone that, in view of the personalities involved, the *nolle prosequi* was being deployed to save the Vice President of the Republic from the embarrassing rigours of a criminal trial. As such, this case showed that the exercise of the AG's discretion to enter *nolle prosequi* was subject to abuse and that the Court's hands appeared tied even if there was clear

[12]Mwalimu Mati & John Githongo, "Judicial Decisions and the Fight against Corruption in Kenya" in A Strategy for Reforming the Judiciary of Kenya (Transparency International-Kenya, 2013).

[13]'Wako denies being swayed over the Delamere and Lucy Cases,' The Nation Reporter. (Monday May 23, 2005)

[14](1995) LLR 1163 (HCK)

evidence that the said discretion was being exercised for political expediency and not for the public good.[15]

Cases such as above were norm rather than the exception. In fact, even in instances where the prosecution bungled their cases or where defective charges had been brought, *nolle prosequi* was often used as a tool to discontinue such proceedings and allow the prosecution a second bite at the cherry at a later date.[16] This is not to say that there were no instances under the regime of the repealed 1969 Constitution where Courts readily allowed challenges of *nolle prosequi* that had been entered in bad faith.[17] However, such interventions were rare.

Such abuse persisted unabated, but eventually, the rubber met the road in the spring of 2004. Amidst the clamour for constitutional changes, the issue of the exercise of *nolle prosequi* became a matter of grave public concern. It is pursuant to this animated public discourse that the Bomas Draft included under Article 203 provisions for reforms of section 26 of the repealed 1969 Constitution.

Importantly, in 2005 the case of *Republic v Thomas Patrick Gilbert Cholmondeley*[18]brought to the fore the capricious exercise of the power of *nolle prosequi*. In this case, the accused, a prominent businessman and grandson of Lord Delamere of the great and vast Delamere Estate, shot and killed a Kenya Wildlife Service warden. The accused was eventually charged with

[15]Kanchori Saitabao, "Kenya: Don't Shoot the Messenger to Stem Fury On 'Nolle Prosequi'" (All Africa June 6, 2005) https://allafrica.com/stories/200506070044.html accessed July 25, 2021

[16]See *Rupert Nderitu and Others v Republic*, Criminal Appeal No. 319 of 1985 (C.A) (unreported); *Mwau v Republic* [1985] KLR 748.

[17] See for this *Crispus Karanja Njogu v Attorney General*, Criminal Application No. 39 of 2000 (unreported); *Veronica NjeriKiarie v Republic*, Miscellaneous Criminal Appeal No. 29 of 2005 (Kakamega) [2005] eKLR; *Adan KeynanWehliye v Republic*, Criminal Case No. 223 of 2003 [2005] eKLR; *Otieno Cliffors Richard v Republic*, Miscellaneous Civil Suit No. 720 of 2005 [2006] eKLR.

[18]Criminal Case No. 36 of 2005 (unreported).

murder, and there seemed to have been sufficient evidence to sustain the charge of murder. However, against all odds, to the surprise and consternation of many, the then DPP, at the instructions of the AG, presented to Court a *nolle prosequi* on 17th May 2005 and sought to terminate the criminal proceedings citing lack of evidence to sustain the charge.

The presentation of the *nolle prosequi* in the *Cholmondeley Case* drew so much public hue and cry and significantly fuelled the need for reform. It is largely because of this case that the myriad of problems that were inherent in the exercise of the power of *nolle prosequi* under the repealed 1969Constitution entered the national psyche and ultimately influenced the new design and character of *nolle prosequi* under the 2010 Constitution. The new dispensation sought to infuse checks and balances into the hitherto absolute discretion enjoyed by the AG. This heralds an unprecedented paradigm shift in the way the influence of *nolle prosequi* is wielded.

The Constitution of Kenya 2010 formally establishes the independent Office of the DPP (ODPP), separate and distinct from the office of the AG. The ODPP is vested with *inter-alia* the powers to take over and discontinue criminal proceedings but with limited discretion.[19]

To prevent external influence on the office of the ODPP, the Constitution establishes this office as an independent constitutional body, with the DPP having a secure tenure of office. The DPP is appointed by the President following recruitment, selection, and recommendation of the Public Service Commission (PSC) and is subject to the National Assembly's vetting and approval.[20] The Term of the DPP only terminates upon the voluntary resignation of the office holder, his

[19] Article 157 of the Constitution of Kenya, 2010.
[20] The Constitution, 2010, Article 157 (1).

removal subject to Article 158 of the Constitution[21] , and/or upon the effluxion of his maximum eight (8) year term[22]. In this sense, the DPP does not serve at the pleasure of the President, and as such, his vulnerability to external pressure and influence has been greatly diminished.

In limiting the exercise of the power of *nolle prosequi*, Article 157(8) of the Constitution stipulates that the ODPP cannot discontinue a prosecution without the permission of the Court. But that is not all. Article 157(11) further provides that the ODPP, in exercising all its functions, must have *regard to the public interest, interests of the administration of justice,* and the *need to prevent and avoid abuse of the legal process.* For the first time, therefore, a constitutional threshold now applies to the exercise of the power of entering *nolle prosequi*.

For the first in our criminal justice system, a novel introduction is made to secure the rights of an accused person who has been taken through the prosecution's case. Under Article 157(7), the Constitution provides that where a *nolle prosequi* is entered after the close of the prosecution's case, the accused stands acquitted. This implies that similar proceedings on the same facts cannot be reintroduced in the future against an accused where the prosecution discontinued the proceedings after closing its case. This is significant because it would prevent instances like those seen before where the prosecution having closed its case would enter a *nolle prosequi* upon the realization that the accused had a good Defence and later re-prosecute the accused having beefed up their case.

[21]The DPP may only be removed if and when a Tribunal appointed by the President at the request of the Public Service Commission (JSC) to investigate his conduct or person make recommendations to the President for his removal.

[22] The Constitution, 2010, Article 157 (5).

On the face of it, these Constitutional safeguards on the manner in which *nolle prosequi* is to be exercised by the DPP appear noble and salutary. But like every new legal instrument, the efficacy of these principles can only be determined by examining their practical application.

Ten years have elapsed under the new Constitutional order. It is therefore germane to undertake an inquiry on whether these lofty aspirations that ought to guide the exercise of the powers of *nolle prosequi* have been achieved in practice.

Thus, this study seeks to analyze whether the ghosts of the past have been exorcised completely or they continue to afflict the present. More succinctly, the study interrogates, in everyday application in our court system, whether the legal threshold stipulated under Article 157(11) of the Constitution has been upheld and whether the broad principles envisaged therein have been brought to fruition. In so doing, the study draws lessons from other jurisdictions on how the power of *nolle prosequi* is exercised and makes recommendations on how Kenya can further deepen the reform on the exercise of *nolle prosequi*.

## 1.2. STATEMENT OF THE PROBLEM

At independence, Kenya inherited the colonial legacy of absolute discretion in the exercise of the power of *nolle prosequi* asvested in the AG. At the time, it all sounded reasonable and proportionate. The State needed to be in the driving seat of all criminal prosecutions with all its options at its disposal. Over time, however, a general public discontent began to emerge against the backdrop of chronic abuse of *nolle prosequi* by the AG under the repealed Constitution.[23]As a logical consequence of what was regarded as inappropriate *nolle prosequi* dismissal of cases,

[23]Desma Nungo, Nolle Prosequi Unjust, AllAfrica.com, available at http://allafrica.com/stories/200503140908.html (Last accessed on 15th August 2021).

public confidence in the AG's office plummeted.At the heart of this national discomfort was the unfettered nature of these powers.[24]

The promulgation of the 2010 Constitution brought with it significant changes in the manner *nolle prosequi* is exercised. Firstly, it is now a requirement that the independent ODPP may, *with leave of Court,* discontinue any criminal proceeding before judgment. Secondly, such discontinuance can only be effected if it is *in the public interest*, meets the *interest of the administration of justice,* and in circumstances that do not engender the *abuse of the legal process*. Thirdly, it is now the supreme law that such discontinuation operates as a discharge of the accused on all charges that the *nolle prosequi* has been entered on but does not bar the institution of similar charges on same facts against the accused in future. However, if the *nolle prosequi* is entered after the close of the prosecution case, then the discontinuation amounts to acquittal, and the double jeopardy rule would apply.

The importance of these limitations to the exercise of the power of *nolle prosequi* cannot be overemphasized. They are in themselves a powerful bulwark against blatant abuse of discretion. This is significant considering the propensity with which this power was often improperly deployed. However, history teaches us that good laws *per se* do not translate to a just society. Behind every innovative legal regime lies its latent potential for failure. Only a proactive approach to its implementation can lead to a realization of the aspirations that informed its enactment. Consequently, it is germane to test the efficacy of the new dispensation *vis-à-vis* its practical application. In other words, has Article 157 of the Constitution cured the ills of the *nolle prosequi*of old? Are the broad principles set out in Article 157(11) of the Constitution that

[24]Corruption in Kenya, Is the Attorney General Letting KACC Down?, available at http://corruptioninkenya.wordpress.com/2009/07/20/is-the-attorney-general-letting-kacc-down/ (Last accessed on 15thAugust 2021.

ought to guide the exercise of *nolle prosequi* adequate in themselves, or is there some lacunae that need to be addressed? How have the courts given effect to the broad principles under Article 157(11) of the Constitution that govern the exercise of the power of *nolle prosequi?*[25]

Such an inquiry is momentous given that the Constitution of Kenya 2010 is now over ten years old. It is not only a perfect opportunity to examine its milestones thus far but it is also opportune to reflect on its success in taming the wanton abuse of the power of *nolle prosequi*. Indeed, such a study is given impetus by the fact that save for the general provision at Article 157(11) of the Constitution as to the matters the ODPP must consider in executing its constitutional mandate, the Constitution and all other enabling legislation, regulations or guidelines are silent on the threshold that the prosecution must surmount in order to show that it is exercising its discretion in the manner contemplated by the Constitution. In the absence of such threshold, the exercise of the power of *nolle prosequi* is left to the wisdom of the ODPP and the unfettered discretion of the Court. Thus, the ODPP may very well dupe the Courts who have no yardstick to measure fidelity to the principles aforestated and thereby succeed in continuing the historical abuse of this power.

### 1.3. JUSTIFICATION FOR THE STUDY

The well-documented abuse of the power of *nolle prosequi* over the years necessitates an inquiry on whether the principle of a fair trial as encapsulated in the 2010 Constitution and, in particular,

[25]Even in the current dispensation, the prosecution may still move the Court and withdraw criminal proceedings with infinite prejudice to the accused person before the close of its case upon realising that it has a weak case. In this case *nolle prosequi* would once again be used as a tool to pepper through prosecutorial incompetence and unfairly subject an accused to re-litigation of criminal matters for as long as the Court would allow the prosecution to perfect its case.

the threshold set at Article 157(11) has reversed the ills of the inglorious era under the repealed 1969 Constitution.

However, no serious, focused study has been undertaken to determine the pervasiveness of such abuse and/or investigate the efficacy of the principles enunciated by the Constitution of Kenya 2010 in addressing these abuses. Where an attempt has been made, different researchers provide a broad synopsis of Kenya's criminal justice system.[26]

There is also the fundamental aspect of crimes committed by corporations. Based on their corporate nature, these entities enjoy an unequal treatment in the criminal justice system.[27] Our criminal justice system is still a preserve of the State and the natural individual. History shows that it is the influential natural person[28] that has been the undeserving beneficiary of the of the power of *nolle prosequi*. By necessary implication, corporations are no doubt more pervasive[29] and would easily bend the ODPP into deploying the power of *nolle prosequi* in their favour so as to ward off the discomfort of a criminal prosecution. It is therefore uncommon to find any study that has analyzed the prevalence of the application of *nolle prosequi* in situations where corporations are the accused.

In light of the above, the purpose of this paper is to highlight the theoretical and contemporary foundations of *nolle prosequi*and thereafter examine its application in Kenya under the Constitution of Kenya 2010. It sets out in great detail the instances in which this power was

[26] Patrick Kiage criminal law journals.
[27] This is differential treatment is based on the notion that corporations cannot commit offences independently from their representatives or natural persons that control them.
[28] See *Odinga v Saitoti* Ibid.
[29] One only needs to imagine the spectacle of having Safaricom Limited or East African Breweries Limited on the dock being prosecuted by an ordinary citizen and the prospect of a *nolle prosequi* being tendered becomes a real possibility.

abused or applied in a manner that violated the notion of justice. It investigates the reforms brought about by the Constitution of Kenya 2010 and ultimately evaluates how effective these reforms have been in remedying the historical abuse of *nolle prosequi*.

In this endeavour, this study will augment the fledgling repertoire of research in this area and look at other jurisdictions, more specifically South Africa and the United States of America, in a bid to make recommendations on how the broad principles set out in Article 157(11) of the Constitution of Kenya 2010 may be further developed so as to provide further cogent accountability standards with respect to the exercise of the power of *nolle prosequi* and suggest guidelines as to its exercise in practice.

## 1.4. RESEARCH OBJECTIVES

(a) To examine the historical antecedents of *nolle prosequi* and the consequential legal provisions and powers as vested in the office of the Kenyan AG by the repealed 1969Constitution and the manner in which these powers were exercised;

(b) To evaluate the efficacy of the provisions that limit the exercise of the power of *nolle prosequi* under article 157 the Constitution of Kenya2010;

(c) To analyze the legal basis of *nolle prosequi* in other jurisdictions and how this principle has been exercised in those jurisdictions in light of their enabling legal provisions; and

(d) To propose an agenda for reform with regard to re-designing the nature and mode of exercise of the power of *nolle prosequi* in Kenya.

## 1.5. RESEARCH QUESTIONS

(a) What is *nolle prosequi*, and how has its application evolved under common law and in Kenya?

(b) What is the efficacy of the current legal framework and, in particular, the matters set out in Article 157 of the Constitution of Kenya in providing checks and balances on the exercise of *nolle prosequi* in Kenya?

(c) How have different jurisdictions provided limits to the exercise of the power of *nolle prosequi*?

(d) What reforms are necessary to ensure a just exercise of *nolle prosequi* in Kenya?

## 1.6. HYPOTHESES

This study is premised on the following hypothesis: -

> Whereas the Constitution of Kenya 2010 has provided much needed juridical limits as to the permissible extent of the exercise of the power of *nolle prosequi*, the said safeguards, when parsed against the old dispensation under the repealed 1969 Constitution, remain nonetheless uncertain and ineffective as there are no guidelines to regulate the exercise of this power thereby falling short of a nation's quest for an end to its historical abuse.

## 1.7. THEORETICAL FRAMEWORK

### 1.7.1. Criminal Justice

Theorizing criminal justice, according to Peter B. Kraska, is valuable in two ways. To begin with, an intuitive grasp of the "why" of criminal law attitude is required for efficacious policy and planning in criminal law. As per Kraska, a second benefit is that there is a necessity for the

formulation frameworks that will guarantee crime control, and theory is critical in this regard.[30]As per Kraska:

> *"Practice informs and guides theory, and hypothesis informs practise." Their collaboration is essential for designing and integrating well-informed, efficacious, and adaptable policies and practises."*[31]

In light of the foregoing, this research will base its theoretical foundation on John Rawls' work. John Rawls proposed the justice as equitable theory of social justice, in which he defined justice as the belief that people are equal under the law.[32]The principles of justice, according to Rawls, are principles that people who are free as well as rational, and who want to extend their own interests, could further accept to govern and organise citizens.[33]When people are in a state of ignorance, Rawls alleges, people decide how to monitor and control their assertions against each other.[34]In this scenario, Rawls presumes that all people are equal and have comparable rights in the process of selecting precepts. This, according to Rawls, ensures that no one is put in a position of advantage or disadvantage in the selection of precepts.[35]After agreeing on the principles of justice, Rawls contended that people elect a Constitution and a legislative power to enforce legislation that are consistent with the consented principles of justice.[36]

---

[30]Ibid.

[31] Ibid.

[32] George Christie and Patrick Martin, *Jurisprudence: Texts and Readings on the Philosophy of Law (*2nd edn, West Publishing Co. 1995) 307.

[33] Ibid.

[34] Ibid.

[35] Ibid.

[36] G. C. Christie and P. H. Martin (n 30).

Rawls went on to identify two principles of justice that must guide a society's assignment of rights and duties, as well as the dissemination of socioeconomic benefits:[37]fairness in the manner fundamental rights and responsibilities are designated;[38] and acknowledgement of disparities if only each citizen has a plausible opportunity to obtain the points that result to the disparities.[39]

This research will not attempt to delve into the details of Rawls' second principle. Instead, it focuses on the more important first principle.

Rawl's first principle asserts that all community members have fundamental freedoms and privileges.[40]Rawls contended that, regardless of their performance, laws and institutions should be restructured if they really are unjust.[41]The above-mentioned summary of John Rawl's theory of justice and fairness informs this research. Rawl's first principle confirming fundamental rights, would be valuable in determining how the nature of Kenya's criminal laws and policies affect peoples' rights, as well as whether the utilisation of such laws and policies attains Rawls' goal of fairness and justice. Rawls' theories will be useful in determining how the DPP's constitutional power to exercise nolle prosequi impacts the expulsion of justice in the public interest.

### 1.7.2. The Social Contract

Over time, numerous authors have clarified the premise for the exercise of State power in multiple ways. For example, a British ruler once asserted that King had divine right to run the

[37] Ibid, 309.
[38] Ibid.
[39]Ibid.
[40] Anne Barron, Hugh Collins, Emily Jackson, Nicola Lacey, Robert Reiner et al, *Introduction to Jurisprudence and Legal Theory*: *Commentary and Materials* (Oxford University Press 2005).
[41] Ibid.

country.[42]This assertion, nevertheless, has since been debunked, and no democratic state can assert to rule or govern by divinity. The social contract theory provides a more satisfactory theoretical explanation for the exertion of State power presently.

Thomas Hobbes popularised the social contract theory and which was later defended by Jean-Jacques Rousseau and John Locke. This hypothesis assumes that the State arose from anarchy. As per social contract theorists, man once upon a time resided in a natural form without power. Man was said to be self-sufficient and therefore fully independent in this nation. The lack of State relations, on the other hand, reduced folks to the law of the jungle for Hobbes and, to a lesser degree, Rousseau.[43]

Man might only be able to survive in the jungle if he had the vigour of his arm. Unless someone is the harshest and most mighty person in the community, one's personal life and belongings are perpetually threatened by his or her extra potent neighbours' selfish behaviour.[44]Only the fit and powerful would be able to survive. Since the notion of just and unjust was not yet devised, there was no communitarian obligation and, for that matter, nor justice. Nobody cared about what happened to another because everyone was focused on their own enthusiasm and pre-emptive discernment.

In his work the Leviathan, Thomas Hobbes characterises life in the State of Nature as anarchy devoid of moral or legal order.[45]The concepts of right and wrong, issues of social justice, and

[42] The exhortation by St Paul in *Romans 13: 1 – 2* that we should obey the powers that be is thought to be the origin of this discredited primordial notion that placed monarchs above ordinary human beings and engendered the concept of divine kingship.

[43] Eric Engle, 'Aristotle, Law and Justice: The Tragic Hero' (2008) NKLR 35, 1-18.

[44] Lisa Kern Griffin, 'Narrative, Truth, and Trial' (2013) GLJ 101, 281.

[45] Thomas Hobbes, *The Leviathan,* (Cambridge University Press, 1991) 88; Wayne Morrison, *Jurisprudence: From The Greeks To Post – Modernism,* at 91. Hobbes states that: "It is manifest that during the time when men live

even the notion of mine and yours, according to Hobbes, had no place in this set of circumstances.[46]

This is due to the fact that mankind is roughly equal in a world with scarce funds, culminating in constant conflict.[47]Everyone in such a state would've been continuously vulnerable to aggressive incursion of his or her life and property. It is also proposed that civilised life would've been inconceivable because there would be no assurance as to the life and security of propertythus making life's process significantly dangerous. *"In such a situation, there is just no place for sector, since the fruit thereof is dubious, and, worse yet, constant fear and threat of gruesome death as well as the future of mankind, lonely, impoverished, vicious, barbarous, and brief,"* says Mutakha Kangu."[48]

Hobbes believed that man is indeed not inherently good, but rather a self-centered egoist.[49]He goes on to explain that the artefact of each and every person's voluntary acts is to benefit oneself in certain way. Human intentions were all in their natural form steered by unsophisticated self-interest, which might possess extremely detrimental impacts if uncontrolled.[50]

The principle of the right to nature, *jus naturale*, states that every person has the freedom of using his or her own authority for the sake of preserving his or her own life.[51] However, man realised that in order to avoid the organic state war, he wanted to give up some of his free choice. The only other option was for humanity to perish by self-destruction and extinction.

---

without a common power to keep them all in awe, they are in that condition which is called war and such a war is of every man against every man."

[46] Mutakha J. Kangu, 'Social Contract Conceptualization of the Theory and Institutional Governance' (2007) 1 MULJ, 1-15.

[47] T. Hobbes (n 41).

[48] M. J. Kangu (n 42).

[49] T. Hobbes (n 41).

[50] Ibid.

[51] M. J. Kangu (n 42); T. Hobbes (n 41).

This state of nature became unsustainable and intolerable, necessitating the search for adjunct solutions. This set the tone for the events leading up to the transition from solitude to society. The social need for institutional governance and its three prominent facets of organised and/or political or civil society, law, and government had eventually reached, it was realised.[52]

In elucidating on the abdication of the state of tranquility and the capitulating of natural rights to embody the rule, Beccaria Cesare, Voltaire, and Ingraham Edward propose the aforementioned:

> *"Extremely wary of living in a sustained State of war, and savouring a liberty, which had become of little value, from the ambiguity of its timeframe, [mankind] sacrificed one component of it, to spend the rest in peace and prosperity.". ''*[53]

Through the social contract, the natural state was transformed into a civil state. The person, community, and a centralized administration or sovereign are all parties to a social contract. While people's right to self-defense warranted its use of violent action against others, all members of the population agreed to give up their right to self-defense in the interest of self preservation. The person relinquishes his right to use violence in favour of the sovereign on the condition that other members of society relinquish their rights as well. According to Hobbes, the accord was as follows:*"...I relinquish my right to govern myself to this person or this assembly of men on the condition that you relinquish your right to govern yourself to him and authorise his acts in the same way."*[54]

---

[52] M. J. Kangu (n 42) 16.

[53] Cesare de MarcheiseBeccaria, '*An Essay on Crime and Punishment'* (Edward D. Ingraham (tr), 2nd edn, P. H. Nicklin Publishers, 1819) 15.

[54] T. Hobbes (n 41) 145.

This defined the beginning of a civilised society as a response to the natural world's troubles, with the sovereign assuming responsibility for the person's good and organised life. The sovereign used the authority relinquished by society's individual people to act in accordance with the powers relinquished."... *to the end that he would use the power and means of them all as he shall think imperative for their tranquilly and collective security*"[55] the sovereign was established.

To this end, the nation is granted the power to regulate and exert power over the use of violence. As a result, it safeguards its citizens from the unauthorised depravities of the stronger and more influential, while also maintaining peace by punishing criminals. Citizens are only required to abide by the law and relinquish their dominance on using force to the (ostensibly) beneficent State.[56]

The agreement between the nation and the residents involves stipulations that protect citizens not only from becoming crime victims, but also from becoming wrongfully prosecuted and convicted by the state. In this respect, the social contract is appealing in so far as as the State can fulfil the foregoing two obligations.[57]

According to John Locke, man lives in an environment where he has full access to specific basic fundamental rights, and the government is required to protect those rights. As a result, the government strengthens and protects natural occurring ownership rights, as well as the rights to life, freedom, and belongings. The government creates laws "*for the defence of...goods,*

[55] Ibid, 95.
[56] L. K. Griffin (n 40).
[57] Ibid.

*safeguarding man from the savagery and fraud of their compatriots, and from the hostile intrusion of foreigners,"* according to the Constitution."[58]

On the other hand, Jean Jacques Rousseau represents social contract as a situation in which the challenges to human restoration became bigger than each person's strength might overcome, and men banded together to provide a sufficient united amalgamation of forces to overcome these challenges.[59]He goes on to say that the social contract emerged when an individual affiliated himself completely with the entire society, including all of his rights. An offence against one of the above multitude's members becomes an offence against the entire political class once it has been united. As a result of duty and interest, the two parties to a contract must mutually assist one another.[60]As a result, Rousseau describes the social contract as an ordinary person entrusting his person and authority to a communitarian possession under supreme direction of the communitarian consent.

As a result, the social contract theory serves as the foundation of society. Individual citizens gave up one's rights and power to a sovereign entity, which then used the power it was given to govern society's behaviour and keep the peace. To achieve this, the state enacts laws governing society, with the goal of maintaining peace and security by penalising perverts. In exchange for the Nation assuring everyone's peace and security, the person agrees to follow the State's laws.[61]

---

[58] John Locke, 'John Locke Letter Concerning Toleration 1689 American History From Revolution To Reconstruction and Beyond' (*Let.rug.nl*, 2018) http://www.let.rug.nl/usa/documents/1651-1700/john-locke-letter-concerning-toleration-1689.php accessed 24 July 2021.

[59] Jean Jacques Rousseau, *The Social Contract:Contrat social ouPrincipes du droit politique* (Henry A. Myers (trs), Paris Garnier Frères 1800) 240332.

[60] Ibid.

[61] Wayne Morrison, *Jurisprudence: From the Greeks to Post-Modernism*, (London, Cavendish Publishing Limited, 1997) 91.

On this premise, the State justifies retaining the authority to pass laws and to demand conformity to such laws under penalty of punishment if disobedience occurs. That's also the foundation for the pragmatist claim that law is a supreme command supported by coercive power.[62]

The social contract, as the foundation of society, entails all individuals coming together to establish a civil society in order for everyone to live in peace and order. When a group of individuals is this united, an offence against one of them is an offence against the whole, and the Nation, as the custodian of the men's combined power, has the authority to punish the offender.

As a result, the social contract serves as a hypothetical foundation for the exertion of State power. It explains how the State came to be the overall observer of the enforcement of criminal law by providing the theoretical rationale for the State's underlying power to enact the law. The State determines the content of the criminal laws it imposes and has complete control over the entire criminal justice process. As a result, the State is in a position to exert control over the criminal justice system.

The transition from a state of nature to an organised society necessitates legal governance and constitutionally valid entities. As a result, the end of the social contract is the government's safeguard of individual people. To this end, the state enacts legislation to maintain social order. The Constitution, which establishes entities of governance, penal laws, which criminalise certain actions and exclusions that threaten citizens' peace and security, and criminal procedure laws, which operationalize criminal justice, are all pertinent to this research.

[62] Herbert Lionel Adolphus Hart, *The Concept of Law*, 2nd edn (London, Clarendon Press, 1997).

To safeguard the citizens, the State has the primary obligation and power to capture violators of the penal laws (criminal suspects), to take them thru the judicial process, and to prosecute them for the accusations levelled against people.

The state is responsible for maintaining public order and security, as well as enforcing criminal statutes. A criminal offence perpetrated on the territory of the state is a crime against the state. All criminal investigations are brought in the name of the State, not the victim of the crime, in many of those if not all jurisdictions. For example, all criminal charges are primarily crown suits under common law because all transgressions are either against the Emperor's peace or his throne and integrity.[63]

In Kenya, for example, a criminal case brought in the name of the Republic. Even if Y suffers and eventually dies as a result of X's actions, Y's State shall not bring a criminal prosecution against X, but the Sovereign shall bring a criminal prosecution (charge) against X for killing in violation of Sections 203 and 204 of the Penal Code[64], with R (Republic) as the parties involved. This is because criminal law and process are open to the public, as is the government's participation in the social contract.

By guiding and dictating prosecutions, the State serves the general public, as well as the complainant and the accused. This introduces the second limb of the State's social contract contribution: in addition to protecting the public from crime, it must also protect the suspect from wrongful conviction and punitive measures; it must ensure that the suspect receives fair trials and is not subjected to unjustified, excessive, biased, unreasonable, or inconsiderate mistreatment by the justice system.This is accomplished by guaranteeing that many who face prosecution

[63] Bernard M. Dickens, 'Control of Prosecutions in the United Kingdom' (1973) 22 ICLQ 1.
[64] Chapter 63 of the Laws of Kenya.

rightfully deserve to do so after a thorough examination of the evidence presented, an audit of the accused person 's physical and mental ability to stand trial, the accused person's eagerness to collaborate with the prosecutorial officials in indicting other major crimes, and reparation by the perpetrator. After contemplating all of this factual information and the national good, the State could simply drop or dismiss the charges against the alleged perpetrator.

The notion of *nolle prosequi* is based on the public interest considering of public litigation as well as the State's second involvement in the social contract context.

As a result, nolle prosequi must be based on and steered by public interest considerations. The power of nolle prosequi should be viewed through the lens of the social contract, and it should be used sparsely in the public interest to avert subjugation of the accused person, according to this research. In any case, it should not be used to protect specific individuals from litigation. There will always be compelling rationales to end a criminal case with a *nolle prosequi.*For example, if the accused is severely ill and cannot face prosecution without suffering undue hardship, if the accused is charged with a lesser crime but agrees to assist the prosecution in the investigation and prosecution of a more major felony causing public harm, or if the suspect and the plaintiff have agreed to reconcile[65].

The preceding instances are by no means exhaustive, and the use of the power of nolle prosequi must be allowed only after careful consideration of the facts of each case and identification of the pertinent public interest problem.

[65] Alec Samuels, 'Non-Crown Prosecutions: Prosecution by Non-Police Agencies and by Private Individuals' (1986) CLR 1, 33-44.

## 1.8. LITERATURE REVIEW

The power of nolle prosequi wielded by the DPP after 2010 is a relatively new idea, despite the fact that the revised 1969 Constitution is well-documented. There is little, if any, jurisprudence based on the 2010 Constitution, and this dissertation seeks to change that. In this chapter, we shall exhibit several of the most relevant literatures on the exercise of *nole prosequi* authority, which will serve as a foundation for the research's recommendations.

"The role and function of prosecution in criminal justice"[66] by Jonathan John Mwalili is a wonderful place to start. In this essay, Mwalili looks at Kenya's criminal justice system, focusing on the role of prosecutors in criminal cases. In Kenya and other jurisdictions, he believes, the most challenging task of a prosecuting attorney is deciding whether or not to prosecute. The focus of the author is on the Attorney General's role in criminal procedures. Mwalili observes that the Attorney General (then known as the Chief Public Prosecutor under Kenya's 1969 Constitution) rarely explained his reasons for launching or withdrawing a prosecution to the public. This is relevant to the current study, which examines the role of the DPP in criminal cases. The DPP, like the AG at the time, is not obligated by law to explain why he initiated or terminated a criminal case. This is the situation.

In "Procedures in Criminal Law in Kenya,"[67] Momanyi Bwonwonga discusses how the power of *nolle prosequi*has conventionally been executed in Kenya under 1969 Constitution. He notes that the jury had no authority in a withdrawal by entering a *nolle prosequi*. The charge is revoked when it is entered, all that is left is for the court to release the accused. The report mentions the

[66] Jonathan Mwalili, 'The Role and Function of Prosecution in Criminal Justice' (*Unafei.or.jp*, 2018) https://www.unafei.or.jp/publications/pdf/RS_No53/No53_23PA_Mwalili.pdf accessed 24 July 2021.
[67]MomanyiBwonwong'a, *Procedures in Criminal Law in Kenya* (East Africa Educational Publishers 1994).

earlier case of *Rupert Nderitu and others v R*[68]wherein the AG granted a *nolle prosequi* after accused had presented their case, resulting in the accused being released. They were then arrested again and accused of the same crime. The accused preferred a constitutional challenge in the High Court, making an argument that the discharge, which occurred after they had been put on the stand, was an exoneration, and thus they could use the defensive system of *autrefois*. The court dismissed this assertion, noting that section 82 of the Criminal Procedure Code allows the AG to enter a *nolle prosequi* at any time prior to judgement. The researcher emphasises that the AG's power of *nolle prosequi* was entirely discretionary, and its application to terminate criminal cases won't result in an exoneration since the suspect might be charged again. The goal of this research is to tackle this issue in order to make sure that accused's rights are upheld.

In a paper titled "The Office of the Attorney General in East Africa: Protecting Public Interest through Independent Prosecution and Quality Legal Advice,"[69]Godfrey Musila argues that the AG and DPP are civil servants who must always act in the public interest as provided by the laws governing the office. In this respect, a range of concerns are pertinent. For starters, since prosecutorial decisions are taken at the highest ranks, it necessitates a high level of expertise. He also emphasized the significance of the AG acting autonomously[70]. He correctly states that the Attorney General cannot be the Government's chief legal advisor and still be presumed to prosecute fairly. This paper will be useful in guiding this research as to the DPP's key mandates

[68]*Rupert Nderitu and others v the Republic* Crim. App. No. 319 of 1985, CA, unreported.

[69] Konrad Adenauer Stiftung "The Office of the Attorney General in East Africa: Protecting Public Interest Through Independent Prosecution and Quality Legal Advice" in *Reinforcing Judicial and Legal Institutions: Kenya and Regional Perspectives* (Godfrey M. Musila (eds) 2007) http://www.researchgate.net/publication/265484385_The_Office_of_the_Attorney_General_in_East_Africa_Protecting_Public_Interest_through_independent_prosecution_and_Quality_Legal_Advice (Last accessed on 24th July, 2021).

[70] This is because prosecutorial powers lay upon the Attorney General then. This article was based on the Kenyan Constitution, 1969 (n 3).

and the presumed boundaries within which he should assert his power and authority in order to act in the public interest.

In his study of *nolle prosequi* in Nigeria,[71]Osita Mba emphasised the importance of taking into account the factors when nominating and appointing the AG. He contended that when an AG is appointed, the "*dignity, capacity, expertise, and mastery requisite of the person who holds this high and crucial office*" must be considered[72]. In his opinion, and in the opinion of this research, the AG must be someone who would always "have regard to the public interest, the interest of justice, and the need to thwart any abusive behaviour of the legal process" when performing his duties"[73]Osita also believes that the power of nolle prosequi has been misused by errant AGs with the support of Judges who have strong feelings about the AG's unrestricted discretion.[74]

Edwin Rekosh has asserted the following in emphasising the relevance and significance of public interest lawyering in this context:

> *"...public interest law does not refer to a body of law or a legal field; rather, it was coined to define who the public interest lawyers represented rather than the types of cases they handled. They chose to be advocates for ones who are poor rather than depicting powerful economic best interest. Even so, the word has evolved to refer to a wider spectrum of activities undertaken by lawyers and non-lawyers in the pursuit of civil*

[71] Osita Mba, 'Judicial Review of the Prosecutorial Powers of the Attorney-General in England and Wales and Nigeria: An Imperative of the Rule of Law' (2010) OUCLFhttp://papers.ssrn.com/sol3/papers.cfm?abstract_id=2056290 accessed 24th July, 2021.

[72]Ibid.

[73] Here he was relying on the counsel of Chief Justice Fatayi-Williams in the case of *The State -vs- Ilori* [1983] 1 SCNLR 94.

[74] Lord Greene (M.R) in *Associated Provincial Picture Houses Limited -vs- Wednesbury Corporation* (1947) 1 K.B 223 held that the courts would not interfere with the exercise of discretionary powers unless the discretion was exercised in bad faith, dishonestly, unreasonably or in regard to extraneous matters.

*rights, civil liberties, equality, consumer rights, environmental conservation, and representing susceptible members of society.*"[75]

The DPP is responsible for carrying out his or her duties in the public interest. He is not anticipated to use his power and authority in an irrational or unequal manner. These are emphasised in the Leadership and Integrity Act of 2012. The potency of the said office, according to this research, is determined by the moral fibre of the office's occupant.

Dr. J. L. J Edwards argues in his book "The Attorney General, Politics, and the Public Interest"[76] that while the exact source of the power of *nolle prosequi* is unknown, its fundamental premise appears to be fairly obvious: it was natural for the throne, in whose name criminal prosecutions were brought, to reserve the right to end criminal prosecutions at will. He goes on to argue that issues of fairness and oppression are likely to play a large role in the AG's decision to overrule his own original *nolle prosequi* or one entered by one of his predecessors, reopening a case that the suspect may have thought was closed months or years ago. Despite the fact that a nolle prosequi is not an exoneration, the writer points out that if it is revoked and the same alleged culprit is re-charged, his rights and freedoms will be jeopardized.

In the article, "*Discretion, Nolle Prosequi and the 1992 Ghanian Constitution,*"[77]Kwadwo Boateng Mensah examines the Attorney General of Ghana's use of the power to enter nolle prosequi under Article 88(3) of the Ghanaian Constitution and Criminal Procedure Code. This

---

[75] Edwin Rekosh, Kyra A Buchko and Vessela Terzieva, *Pursuing The Public Interest* (Columbia Law School 2001).https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0ahUKEwjMh--m6-rLAhVIHxoKHWwLCSYQFgg4MAQ&url=http%3A%2F%2Fwww.pilnet.org%2Fcomponent%2Fdocman%2Fdoc_download%2F35-pursuing-the-public-interest-a-handbook-for-legal.html&usg=AFQjCNG3gAs-L9_30uqYsoojWwx8Y7Dq-w&sig2=XgRaAHTPMppYcuk8D30Dgw accessed 24th July, 2021.

[76] John. L. J. Edwards, *The Attorney General, Politics and the Public Interest* (Sweet & Maxwell, London 1984).

[77] Kwadwo Boateng Mensah, 'Discretion, Nolle Prosequi and the 1992 Ghanaian Constitution' (2006) 50 JAL 47-58 https://www.cambridge.org/core/journals/journal-of-african-law/article/discretion-nolle-prosequi-and-the-1992-ghanaian-constitution/F157F844542DAC6B489024DE82F2DCE9 accessed 24 July 2021.

paper resembles section 26 of the 1969 Constitution in many ways. The article argues that AG must be responsible to the public when exercising his authority. The article argues against discretion, claiming that it leads to an arbitrary nature since concessional decisions enable officials to introduce individual or superfluous variables into their decisions, and that it is a main cause of injustice.In attempt to thwart abuse, Mensah continues to make an argument that discretion is structured, controlled, and confined.

Prof. Yoav Dotan's article, "Should Prosecutorial Discretion Enjoy Special Treatment in Judicial Review: A Comparative Analysis of the Law in England and Israel," examines whether the Attorney General's prosecutorial powers, like other executive actions, are subject to judicial review, with an emphasis on England and Israel. Regardless of the focus, the assertion is a prevalent thread in most democratic countries when it comes to criminal indictments.[78]Although the nature of discretion and judgement in criminal trials is unique, the author believes that the court system ought to be able to carefully examine such discretion in order to prevent abuse. This goes against common perception that the AG is a well-known public lawyer who requires a great deal of trust, and that judicial monitoring will make him overly cautious, less decisive, and less effective. This author's viewpoint is consistent with the views expressed in this research on prosecutorial discretion, and as a result, the lessons learned from Dotan's article will be extremely useful to this research.

Patrick Kiage has penned a book *"Essentials of criminal procedure in Kenya."*[79]In this book, Patrick Kiage gives information on Kenyan criminal law and procedure. He presents an overview on Kenya's criminal justice system prior to the 2010 Constitution's promulgation, and afterwards

[78]Yoav Dotan, 'Should Prosecutorial Discretion Enjoy Special Treatment in Judicial Review? A Comparative Analysis of the law in England and Israel' (1997) PL 3, 513-531.
[79]Patrick .O. Kiage, *Essentials of Criminal Procedure in Kenya* (Law Africa, 2010).

explains the relatively new procedure that followed the 2010 Constitution's promulgation. The role of the Attorney General in criminal prosecution under 1969 Constitution, his authority, as well as how the nolle prosequi was applied are all discussed. This research will benefit greatly from this book, as it is the latest generally Kenyan-based criminal law book. Kenyan jurisprudence, that is, the case law and constructs debated in the book's different chapters, will also be beneficial in this research.

In an article *"The Company as a Criminal: Comparative Examination of Some Trends and Challenges Relating to Criminal Liability of Corporate Persons"*[80], George Otieno Ochich contends that the corporate image of a corporation is fictitious and/or synthetic. As a result, it can only act through its agents, the human directors, managers, and servants who have been hired in accordance with the memorandum and articles of association. Because the corporation is a man-made institution, it is incapable of performing illegal acts intentionally or recklessly unless through its agents.

The author uses this logic to illustrate the limitations of assigning criminal liability to a corporation. As a result, it is emphasised that, while a company cannot commit crimes involving personal involvement, it can be prosecuted as an accomplice to such crimes. He uses the example of a company which, while it cannot commit perjury or make similar inaccurate statements under oath because it cannot be put under oath, can be indicted as an accomplice to obstructing justice. Bigamy cannot be committed by a corporation, either vicariously or otherwise. Another example: a company cannot be held liable for killing because it cannot be subjected to corporal punishment.

[80] George O. Otieno Ochich, 'The Company as a Criminal: Comparative Examination of Some Trends and Challenges Relating to Criminal Liability of Corporate Persons', Kenya Law Review, Vo. II (2008 – 2010).

The writer goes on to say that a corporation is similar to a human body in several ways. It has a brain and nerve centre that directs its actions. It has hands that hold the tools and follow the instructions from the centre. The institution's state of mind would be that of its managers and directors. Conspiracy demands well over one participant, and one cannot be prosecuted for colluding with oneself. In the vast majority of cases, if a company is found liable, a director or other controlling officer will almost certainly be found to be an accomplice or accessory to the crime.

As a result, he contends that the company may be held liable for any act attributed to it by an employee or agent. If an offence necessitates *mens rea*, a belief or a state of mind, the corporation will not be held liable unless that belief or *mens rea* was held by a controlling officer. The controller and the corporation, according to Lord Reid, are considered fused. The draught Code recommends reversing the decision's significance. A corporate entity is not subject to liability for a controlling officer's act if it is accomplished with the intent of harming the corporation or disguising harm done to it.

This Article has not touched on the concept of *nolle prosequi* but this study will utilize its core reasoning on criminal liability to a company in determining how and whether nolle prosequi should applied in proceedings against a company.

### 1.9. RESEARCH METHODOLOGY

This study, by its nature, is analytical. It entails an exerting critical examination of decided cases where the State proffered a *nolle prosequi* and how the courts dealt with it. As such, the study relies on secondary sources and is basically, for all intense and purposes, library-oriented. Most of the information in this study is sourced from a wide range of materials, including *inter*

*alia*,textbooks, scholarly articles, judicial decisions from pertinent judiciary of record, conference proceedings and articles, newspapers and press reports, and internet and various library resources, to name a few.

In addition, the research mainly uses descriptive, prescriptive, and perceptive research methods. Other judicial jurisdictions' resources are also incorporated by reference but only for the limited purposes of enriching the study through resort to the wider global intellectual perspective on the subject.

## 1.10 SCOPE AND LIMITATION OF THE STUDY

The purpose of this thesis is to investigate the conceptual justification for the powers of nolle prosequi, as well as how this authority is presently designed and deployed in Kenya's 2010 Constitution. The study is anchored on a critical epoch of the Constitution. It traverses the historical antecedents of the exercise of the power of *nolle prosequi* before and after the 1969 Constitution and how, over decades of application, it became open to inappropriate application and misuse. This paperintends to investigatethe way hitherto Kenyan legal framework led to latent injustice and whether by necessary implication the new Constitution cured the ills of the past or whether there is in need to infuse the current Constitutional dispensation with additional safeguards so as alter the mandate of the ODPP's exercise of the power of *nolle prosequi* and in so doing bring lasting reforms to prevent abuse.

For the reasons stated above, this research will look at historical and existing Constitutional and legislative provisions with regard to *nolle prosequi*, plus various court decisions in which the Attorney General has used *nolle prosequi*and powers as well as how the courts dealt with it.This research will be carried out in the perspective of a comparative evaluation of the law and

practice, and where applicable, the study will draw appropriate lessons from current practice in the United States and South Africa

Finally, the focus of this research is to posit reform plan and a prototype for holding and exercising the power of nolle prosequi in a way that develops the principles of public interest, fairness, and justice in Kenyan jury proceedings.

## 1.11 CHAPTER BREAKDOWN

This study is structured into four chapters as described below:

Chapter one is an introduction to the whole research work. It delineates the scope and extent of the topic under inquiry. The Chapter places the problem within its context by providing a brief background to the question of the power of the exercise of the power of *nolle prosequi.* It not only describes the problem which the study sets out to address but also provides justification for the study as well as the objectives of the study and frames some hypotheses and research questions that will be tested in this research. In the final analysis, the research concludes with the researcher's own subjective view of the various legal theories propounded by select top scholars whose research and expertise in this particular area place them on an authoritative platform when it comes to the conceptual and normative decisional imperatives on the exercise of the power *nolle prosequi.*

The second chapter is an analysis of the development and the exercise of *nolle prosequi* powers under common law and in Kenyan judicial decisions. The goal of this chapter is to look into the Attorney General's powers under the 1969 Constitution. It will attempt to call into question the use of *nolle prosequi* powers, as well as the frequency at which this power has been abused unabated.

Chapter three principally seeks to analyse the efficacy of the current Kenyan legal framework with respect to *nolle prosequi*. It compares and contrasts the provisions of the 1969 Constitution versus the 2010 Constitution. This Chapter also seeks to critically examine the new office of the DPP as provided by the 2010 Constitution. This chapter establishes the jurisprudential foundation for state control of enforcement actions in general, places the government's entry of *nolle prosequi* in criminal cases in context, and examines Kenya's legal framework for criminal prosecution direct authority.This chapter will also seek to analyse the exercise of the power of *nolle prosequi* in the United States and in South Africa for the sole reason of drawing comparisons as well as appropriate lessons Kenya can borrow in order to reform any deficiencies in its legal framework with regards to *nolle prosequi*.

The aim of chapter four is to bring this research together into a unified structure by pulling together in a coherent pattern various strands of the arguments and suggestions put forward in the preceding Chapters. It will serve as a platform for making proposals and proposing a reform agenda for the use of the constitutional authority of *nolle prosequi*. The proposed amendments will ensure that the application of *nolle prosequi* is gradual, advancing criminal justice and protecting the accused's rights (s).

## CHAPTER TWO: A JOURNEY THROUGH THE EXERCISE OF POWERS OF *NOLLE PROSEQUI*

### 2.1 INTRODUCTION

This part delves into acriticalanalysis of historical antecedents of the exercise of powers of *nolle prosequi* from common law and its application in Kenya. This chapter aspires to examine the powers of the AG under the 1969 Constitution and its application in various precedents. In this endeavour, the study demonstrates the propensity with which the power of *nolle prosequi* has through history been abused unchecked.

### 2.2. COMMON LAW

At common law, the AG was the only person who could issue a *nolle prosequi*.[81] Because the sovereign could not attend in the king's Court every time a dispute involving its interests arose, he assigned a counsel to represent him and argue his case. In 1243, Lawrence del Brok became the first qualified attorney to advocate for the sovereign's best interests.[82]He was said to be paid 20 pounds a year "for suing the King's matters of his pleas before him."[83] Lawrence del Brok's research included "... orchestrating acts to recover rental income and pieces of land, proceeding against those who pronounced a punishment of excommunication against a monarch's steward, protecting the King's right to present to religious institutions..." and "...conducting an investigation on murders to adjudicate what relates directly to the Throne...", according to the judicial tape of the period.[84]Through time, the AG in England evolved from a legal representative of the crown to a Chief Crown Prosecutor and MP with considerableduty.[85]

---

[81] *Republic –vs- Dunn*, 1 Car &Kir 730.
[82] Alana McCarthy, 'The Evolution of the Role of the AG' (2004) MurUEJL, 1-4.
[83]Ibid, 2.
[84] Ibid, 3.
[85] Ibid.

In the case of *The Queen, on the Prosecution of Tomlinson v- The Comptroller-General of Patents, Designs, and Trade Marks,*[86]A.L. Smith LJ in the Court of Appeal in England affirmed the wide and absolute discretionary power to enter *nolle prosequi* as assumed by AG with abundant clarity:

> *"Everyone understands he's the English Bar's president." The authority to enter a nolle prosequi in a criminal proceeding is yet another area where the Attorney-General has precedence. I'm not saying that a prosecutor cannot ask a judge to permit a case to be withdrawn, and that the adjudicator cannot refuse if he believes there is just no case, however the AG alone has the authority to enter a nolle prosequi, and that power is unchecked. As a result, when exercising of this kind of functions, his (sic. Attorney-General's) judgements just weren't subject to scrutiny by the Queen's Bench Division or this Court (sic. Court of Appeal)."*[87]

**2.3. COLONIAL KENYA**

In 1895, the British established the East Africa Protectorate. On 12th June 1897, the East Africa Order in Council adopted the reception clause, which effectively applied English equity and common law to Kenya.

Thus, the then 1929 Criminal Procedure Code provided for posited the power of the Attorney General to enter a *nolle prosequi* under Section 79 similar to those under common law. This section provided that in any criminal trial, at any stage before a verdict or judgement, as the case may be, the State Attorney may enter a *nolle prosequi* by declaring in court or notifying the jury in writing that the Crown expects that court hearings will not proceed, and the suspect shall be

[86] (1899) 1 Q.B., 909.
[87] Emphasis added.

immediately released in regard to the charge for which the *nolle prosequi* is entered. However, this discharge is not a bar to the accused being charges on the basis of the same facts. Further if the suspect is not present when the *nolle prosequi* is entered, the registration or clerk of the court shall promptly cause notice in writing of the entry of such *nolle prosequi* to be granted to the keeper of the correctional facility where such accused may be held in custody, as well as, if the suspect has been devoted for court hearing, to the lower court by which he was committed, and such lower court would likely expeditiously lead to a similar writ.

This provision effectively displaced common law as the legislation ranked higher, and it did not take long for its application. In 1948, criminal proceedings were brought against Chief Waruhiu for unlawful confinement. The facts were that the chief while collecting poll tax, refused to take tax offered by one Leonard Kigume and instead imprisoned him. Chief Waruhiu was a loyal follower of the regime, and Chief Native Commissioner Wyn Harris wrote to the AG pleading for a *nolle prosequi*. However, the then Attorney General, Sir Kenneth O'Connor, in his absolute discretion, refused to enter a *nolle prosequi* on the grounds that the complainant had a witness and the chief had admitted guilt.[88] A couple of years later, in 1955, the AG duly obliged to exercise his discretion and entered *nolle prosequi* when a white settler, Walter Wilkins, was charged with the murder of a Kenyan peasant, Wallace Gitagia. No reasons were given, only that as soon as the AG made his application, the same was allowed.[89]

[88]EvansonWamagatta, *Controversial Chiefs in Colonial Kenya: The Untold Story of Senior Chief WaruhiuWa Kung'u, 1890–1952* (Rowman and Littlefield, 2016) 79

[89]John Kamau, "Why Kenya Is the Real Happy Valley" (*Business Daily* May 20, 2009) https://www.businessdailyafrica.com/analysis/539548-600694-bvrq37/index.htmlaccessed August 14, 2021

A more dramatic escapade was witnessed in the 1960 case of *P.H. R. Poole v The Republic*.[90] In that case, the accused was charged with murder and, having pleaded not guilty a jury was chosen and sworn. Crown counsel then opened his case and was about to call the first witness when a juror intimated that he had a conscientious objection to giving a verdict of guilty on religious grounds. After an adjournment, Crown counsel entered a *nolle prosequi*. In this instance, the AG used his discretion to avoid a situation where the outcome would have been a mistrial on account of one juror.

### 2.4. POST-COLONIAL

The same stance was maintained after independence. The AG's obligation was to initiate and prosecute criminal cases on behest of the Republic. He was the sole person in charge of convicting and dismissing criminal proceedings.[91]The Attorney General was given the power to initiate criminal prosecutions and enter nolle prosequi on any litigation without consulting anyone or the courts under the 1969 Constitution.[92] Under the said Constitution, provision was made to designate the AG as an independent officer not subject to the control of any other person, be it judges and magistrates or any other judicial officer or even the executive in relation to the decision to institute criminal proceedings.[93] Thus in an ideal situation, the AG had been facilitated to exercise his constitutional mandate in the best interest of the State and the public.

However, as we shall see shortly, it is this era that witnessed the inglorious abuse of the power of *nolle prosequi.* The AG, in the exercise of his absolute discretion to enter *nolle prosequi*, often

[90]1960 E. A. 62 (C.A)
[91] 1969 Constitution, section 26(3).
[92] Vincent Kodongo, *Police Accountability in Kenya* (HRIO and IMLU 2006).
[93]*Githunguri v Republic* Misc. Crim. App No. 180 of 1985 (unreported).

abused this power to shield certain persons from prosecutions, pepper through prosecutorial incompetence, and abuse the criminal court process at will.

### 2.4.1. Lack of separation of powers

Owing to the fact that AG was both the Government's primary consultant and was also intimately involved with prosecution authority, there was a significant conflict of principles. Furthermore, the AG served as an *ex officio* Parliamentarian (MP)[94] and as a result, he instructed Parliament on legal issues and served on the JSC.[95]

The AG's responsibilities were too entwined. The fact that he was a presidential appointee made matters worse.[96]Because the AG had too many responsibilities and lacked the time and resources to effectively supervise them, completely botched trials and poorly written laws resulted.[97]

Because the Attorney General was a presidential appointee, there was plenty of space for political manoeuvring.[98]Political concerns had tainted the use of *nolle prosequi*, and the court system had failed to scrutinise *nolle prosequi* applications in a way that'd reveal wrong motives.[99]

[94] Section 36 of the Constitution of Kenya, 1969 (now repealed).
[95] Section 68(1). It is also important to note that in exercise of its duties, the JSC shall also be not under the direction and control of anybody.
[96] K. G. Adar 'The Internal and External Contexts of Human Rights Practice in Kenya: Daniel Arap Moi's Operational code' African Sociological Review 4(2000) 4, 74-77.
[97] G. Musila, The Office of the Attorney General in East Africa: Protecting the Public Interest through Independent Prosecution and Quality Legal Advice, (2006) 5 Judiciary WatchReport..
[98]M. Mati & J. Githongo, "Judicial Decisions and the Fight against Corruption in Kenya" in A Strategy for Reforming the Judiciary of Kenya (Transparency International-Kenya, 2013).
[99] The Nation Correspondent, Daily Nation, 'Wako denies being influenced over Delamere and Lucy Cases' Monday May 23, 2005.

Such a broad range of prosecutorial discretion served no useful function, and it was authority derived by default instead of a deliberate legislative decision.[100]Courts were reluctant to overturn the AG's judgements for fear of losing their jobs.[101]

### 2.4.2. Absolute Discretion

The AG's power of *nolle prosequi* under the 1969 Constitution was absolute and was an exercise in both public and private criminal prosecutions. Indeed, Courts gave credence to this position and often refused to regulate it even in the face of blatant abuse. In *Kimani v Kihara*,[102] it was held that once the AG had taken over private prosecutions, he was vested with absolute discretion to discontinue the proceedings without further reference to the complainant.

As seen in *Mwau v The Republic*[103], the AG could exercise this power either directly or through delegation. Before the Senior Resident Magistrate in Nyeri, the appellant, who was a senior staff trainer at the Police College in Kiganjo, was charged with unlawful invasion of privacy inside the college, in violation of section 3(1) of the Trespass Act, Chapter 294 of the Laws of Kenya, and public disorder in a police precinct, in violation of section 60(1) of the Police Act, Chapter 84 of the Laws of Kenya. The appellant disputed the allegations' plausibility, but before the court ruling, the Provincial State Counsel filed a nolle prosequi under Section 82 of the Criminal Procedure Code (CPC). The appellant objected, arguing that no delegation authority existed, and sought that the case be brought to the High Court for decision.

---

[100] J. Vorenberg, 'Narrowing the Discretion of Criminal Justice Officials' (1976) 1 Duke Law Journal, 651-697

[101] S Kanchory 'Dont Shoot the Messenger to Stem Fury on *Nolle Prosequi' Daily Nation* Monday, 6th April, 2005. Anglo Leasing and Murgor stating he was never allowed to do his work, available at <http://demokrasia-kenya.blogspot.com/2005/05/very-friendly-message-to-mr-murgor.html (Accessed on 25 July, 2021)

[102] (1985) KLR 79

[103] (1985) KLR 748.

The matter eventually found its way to Nyeri's Court of Appeal. The appeal was dismissed, and the learned jury, Hancox JA, Chesoni, and Nyarangi Ag JJA, highlighted in their ruling that the AG has the ability to halt any judicial proceedings prior to the final judgment. The AG or any of his office's offices acting on his instructions would be able to exercise such power, according to the court. The Court of Appeal further concluded that when the Attorney General or any officer with similar authority files a nolle prosequi, the Court has no choice but to follow the nolle prosequi and dismiss the suspect.

This is further supported by the holding in the case of *R v William Rongurwa Ole Ntimama*[104], where the Court found that the AG had the autonomous discretion to enter a nolle prosequi at any stage until the judgement was rendered.

### 2.5. ABUSE

#### 2.5.1. Prosecutorial Incompetence

In most instances, the power of *nolle prosequi* was often exercised whenever the prosecution came to the realization that their cases were more likely to fail. In this sense, *nolle prosequi* became a tool to enable the prosecution further opportunities to perfect their cases. Since there was no limit to the number of times *nolle prosequi* would be entered, the prosecution was allowed a bite at the cherry for as long as the proceedings reared their heads and the Courts never interfered.

In *Mwau v The Republic,*[105]the accused challenged the validity of the charges brought against him. However, before the Court could rule on this objection, the prosecution acted swiftly and entered a *nolle prosequi*. Soon thereafter, the charge sheet was amended, and new and proper

[104] Crim. Rev. No. 23 of 1995.
[105]

charges were levied. Had the Court ruled in the accused'sfavour with respect to their objections as to the charges, the prosecution would have been barred from bringing similar charges on the same facts in subsequent proceedings. For this reason, the prosecution entered a*nolle prosequi* to allow them to rectify any errors they had made so that the charge would have been validated.

In *Rupert Nderitu and Others v Republic,*[106]after the criminal defendants had been given the opportunity to defend themselves, the AG decided to enter a nolle prosequi. They were then released, only to be re-arrested and charged with same crime. The accused filed a legal challenge in the High Court, making the argument that their release, that occurred once they were put on their defence, constituted an exoneration, and thus the plea of *autrefois acquit* was available to them. The High Court rejected this assertion, holding that the Attorney General had the authority to enter a *nolle prosequi* at any time before judgement was rendered.

### 2.5.2. Shielding of prominent personalities

In another case, *nolle prosequi* was often used to facilitate impunity and shield certain prominent personalities from prosecution. Such cases often involved private prosecutions where the AG would apply and takeover said proceedings, then thereafter make an application to withdraw the matter.

The case of *Odinga v Saitoti and Others*[107] marked the beginning of such abuse. Raila Odinga, then an opposition leader, filed a civil suit in Nairobi Magistrate Court's Private Prosecution No.1 of 1995 against senior politicians, including then-Vice President Hon. Professor George Saitoti, for alleged involvement in criminal activities. Mr. Odinga presented his written complaint to the Chief Magistrate's Court in Nairobi, along with a suggested charge sheet,

[106] Crim. App. No. 319 of 1985, CA (Unreported).
[107] (1995) LLR 1163 (HCK).

pursuant to Section 89 of the CPC, and requested that private prosecution be instituted because the State was unwilling to do so. Mr. Odinga's attorney was presenting his motion when the then DPP, Mr. Chunga, walked into the court on the instructions of the then AG and informed the Magistrate of the AG's directions to take over the proceedings launched by Mr. Odinga under section 26(3) (b) of the 1969 Constitution.

After taking over the prosecution, the DPP immediately submitted a nolle prosequi stretched and accepted by the AG under section 26 (3) (c) of the 1969 Constitution as read with section 82 (1) of the CPC. The judge determined that the nolle prosequi had the effect of ending and discontinuing the litigation of the aforementioned legal case, and the prosecutions were therefore withdrawn.

The Appellant, enraged, filed an application with the High Court under sections 362 and 364 of the CPC, demanding that the court exercise its revisionary powers to access and examine the magistrate court's papers in order to satisfy itself as to the accuracy, legality, and propriety of the orders. The High Court, on the other hand, found that the AG had complete control over all criminal procedures, including a private prosecution, at all stages before a verdict or judgment was issued. According to the Court, the 1969 Constitution gave the Attorney General the right not only to take over any criminal proceedings at any stage, but also the absolute discretion to continue or discontinue them at any time before a verdict or judgment is issued, and he was not required to give reasons for his decision.

An almost identical scenario was witnessed in *Otieno Clifford Richard v Republic.*[108] The background is that on the evening of the 2nd and 3rd May 2005, the then First Lady Lucy Kibaki

[108] Misc. Civ. Suit No.720 of 2005, (2006) eKLR.

supposedly attacked the Applicant, a photographer with KTN and improperly destroyed a digital camcorder valued Kshs. 180,000.00, the Applicant's asset. The Applicant had reported the incident to the police, but when he realised no action was forthcoming, he commenced private prosecution against the First Lady. When the judge heard the motion for leave to launch private prosecutions, the then-DPP, Mr. Philip Murgor, told the judge that he had received special orders from the AG to take over the litigation and stop it immediately.In this case, the DPP proffered the AG with a *nolle prosequi*.The Applicant objected, but the Magistrate accepted the *nolle prosequi* and terminated the intended proceedings. The Magistrate observed that even though he had misgivings as to the discontinuation of the proceedings for it smacked of impunity, was against the public interest, the Court's hands were tied, and that he was bound by law to allow the *nolle prosequi* once entered.

The Magistrate's decision was appealed to the High Court by the Applicant. The application sought a declaration that the AG's termination of criminal proceedings against the First Lady was illegal, inappropriate, and violated the separation of powers concept, as well as a declaration that the nolle prosequi constituted a misuse of power that should be expunged from the record.

Once a *nolle prosequi* is introduced, the Magistrates Court's jurisdiction is confined to recording it and discharging the suspect, according to the High Court. As a result, the High Court ruled. As a result, the Applicant could not claim that he was denied the chance to be heard in the lower court.However, the High Court also noted that it was a superior court and could oversee the proper exercise by the AG of the execution of its power. In nevertheless, refused the appeal on the ground that the police had not been given adequate time to investigate the case, and the AG was not accorded the opportunity to consider the complaint.

Notwithstanding the rationale the High Court gave for its ruling, this case is a perfect example of how Courts conspired with the prosecution to sustain *nolle prosequi* entered in bad faith for the sole reason of shielding prominent personalities. At the time, it was public knowledge that indeed the former First Lady had indeed assaulted the applicant, and there was indeed video footage of the crime as it happened. A formal complaint had also been made to the police. At the very least, the Court would have allowed the AG to take over the case and prosecute it or, wherein the circumstances as they were, allow the private prosecution to continue to its completion rather than dismissing the case in its entirety.

It is also noteworthy these two cases involved powerful personalities in government or, as in the case of Lucy Kibaki, the wife of a sitting President. It is, thus, plausible that the only reason the AG applied to take over these cases and then immediately withdraw them was for purposes of shielding a sitting Vice President and the First Lady from prosecution.

The case of *Republic v Thomas Patrick Gilbert Cholmondeley*[109]was yet another example where the AG abused his power of discontinuing criminal proceedings on account of flimsy reasons. Mr. Samson Ole Sisina (the deceased) worked as a warden for Kenya Wildlife Services (KWS). The dead was brutally murdered by the suspect, Thomas Patrick Gilbert Cholmondeley Delamere, an influential entrepreneur and the owner of the vast Delamere Estate, while on obligation in Naivasha within Rift Valley Province at Delamere Estate.The accused actually admitted that he indeed shot the deceased but had done so in self-defense. There was other cogent evidence that had been reported to have been collected by the police, and thus, the accused was charged with the murder and arraigned in Court. However, before the proceedings

[109] Criminal Case No. 36 of 2005 (unreported).

could kick-off, the DPP presented to the court a *nolle prosequi* which terminated the criminal proceedings against the accused.

**2.6. ATTEMPTS TO PREVENT ABUSE**

It was, however, not all doom and gloom. The abuse of *nolle prosequi* did not go unnoticed by some Courts. Many complainants and accused persons challenged the AG's exercise of *nolle prosequi* in the High Court. In some instances, the High Court obliged and sought to remedy the capricious exercise of the power of *nolle prosequi*.

The case of *Crispus Karanja Njogu v Attorney General*[110] was the origin of such Court intervention. The Applicant had been prosecuted with making a file without authority in violation of section 357(a) of the Penal Code before the Chief Magistrate Court in Nairobi. The suspect entered a not plead guilty and it was released on a Kshs. 200,000.00 bond with a Kshs. 200,000.00 certitude, with the case set for hearing on May 5, 1998.

The Attorney General had written to the Provincial Criminal Investigations Officer, instructing the police to disengage the case against the accused under section 87(a) of the Criminal Procedure Code "because there were some other matters that the Kenyatta University required to be resolved," the prosecutors told the court. The application was dismissed by the court, which stated that there was no single compelling basis for withdrawal under section 87(a) of the Criminal Procedure Code, and so the hearing would continue. The prosecution then asked for and received a court adjournment. The prosecution informed the court that the AG had given them orders to enter nolle prosequi when the matter was reopened. Despite the concerns of the accused counsel, the trial court approved the application since it was necessary by law.

[110] Crim. App. No. 39 of 2000.

The Accused's lawyer subsequently took the case to the High Court to see if the AG had absolute power to enter nolle prosequi. When the matter came before the High Court for decision, the learned judges noted that the Attorney General's post was a government position. As a result, the AG's powers and limits are subject to judicial review by the High Court under section 123(8) of the Constitution. The learned judges went on to declare that the High Court is the only constitutional body with the power to ensure that the criminal justice system is not abused or utilized for coercion. The learned judges of the High Court, Oguk, Rawal, and Etyang JJ, supported this position and ruled to the effect that they felt that the then prevailing practice which prevented a *nolle prosequi* from being challenged in court, breached the separation of powers concept.According to them, to hold otherwise would mean that when a *nolle prosequi* is entered the Attorney General's exercise of authority and influence as a representative of the Executive cannot be challenged in court, which means the Executive Arm of Government is accountable to itself. They then argued that under Kenyan law, such a concept is unsustainable. Thus, they concluded that despite section 26(8) of the Constitution the AG's powers under section 26(3) of the Constitution are subject to a legal determination under section 123(8) of the Constitution. The *nolle prosequi* will be considered and deemed unlawful if the exercise of prerogative to enter a *nolle prosequi* fails to pass the constitutional criteria laid out in section 123(8) of the Constitution."[111]

The Attorney General's entry of a nolle prosequi in the trial court was found to be coercive, arbitrary, against government policy, and an abuse of the judicial process, and thus null and void by the High Court.

[111]Ibid, 27.

Whatfollowed was a string of few cases that sought to apply the *dicta* espoused in the Njogu case. In *Veronica Njeri Kiarie v Republic*[112]The Petitioner requested that the AG's *nolle prosequi* in Court Case No.1524 of 2002 in Kakamega before the Principal Magistrates be declared illegal on the grounds it was entered in breach of trust, was onerous, and against the national good.

The Applicants had been charged with robbery with violence in criminal case No. 838 of 2000 before the Kakamega Chief Magistrate's Court. The case was dismissed under section 87(a) of the CPC. Shortly after her release, the applicants were re-arrested and tried in Criminal Case No. 1524 of 2002 for causing severe physical injury on one Mary Wambui; she pleaded not guilty. Due to the prosecution's frequent demands for postponements, the case dragged on for a long time, from 2002 to 2005. On February 26, 2005, the court granted a second postponement after the prosecution delivered six witness testimony, after which the prosecution requested a brief delay and then presented a nolle prosequi. The Applicant voiced his displeasure.

According to the High Court, which applied the core elements of the Njogu case, the prosecution's admission of nolle prosequi as a retaliation to the trial court's refusal to award a postponement was neither in good faith nor reasonable. The court continued by stating that the ability to enter nolle prosequi can only be exercised in good faith and in the public interest. For the reasons stated above, the courts declared the nolle prosequi invalid and void.

In *Adan Keynan Wehliye v Republic*,[113] the accused petitioned the High Court to have a nolle prosequi entered against him in a criminal case dismissed. The applicant was arrested and remanded in custody in connection with the murders of Ibrahim Ali Abdulla, Hassan Abdurahman Mohammed, and Mohammed Haji Abdi. During his arraignment in the High Court

[112] Misc. Crim. Appeal No. 29 of 2005 [2005] eKLR.
[113] Crim. Case No. 223 of 2003, (2005) eKLR.

29 days later, he was found guilty of three counts of murder and pleaded not guilty. The trial began, and about halfway through it, the prosecutors filed a nolle prosequi, stating that they sought a joint trial with other people who had been charged with murdering the same people as the suspects. The Applicant raised an objection, stating that his fundamental, inherent, and constitutional rights to liberty, legal protection, and a fair trial should not be risked for the prosecution's convenience.

In their Ruling, Nyamu, Kasango, and Makhandia JJ observed that only the cross-examination of key witnesses and, ultimately, the perpetrator's own evidence reveal the perpetrator's defence in a jury case. As a result, at the point where the alleged trial had arrived, the prosecutors was obviously aware of the applicant's defense strategy. To seek to end the trial and charge the petitioner anew would grant the prosecutors an undue advantage in the new case, resulting in a grossly unfair outcome. The learned judges further stated as follows:

> *"We believe it is past time for the police and prosecuting authorities to take personal rights quite seriously and put a stop to the autocratic practice of verbally berating people when there is insufficient proof, and when they reach a 'dead end' or a blind end, people devise a way out by requesting a new trial out via the entry of a nolle prosequi." Allowing such a conduct to take hold could, in my opinion, be ceding the court's obligations as the protector of the person's basic rights as stated in the Constitution."*[114]

In addition, in *George Gitau Wainaina v Attorney General*,[115] the High Court overturned the entry of a nolle prosequi on the grounds that it violated the individual's fundamental right to a fair trial within a reasonable time under Section 77 of the 1969 Constitution. In Criminal Case

[114] Ibid.
[115] HC Crim. Rev. No. 68 of 2003, (2008) eKLR.

No. 4445 of 2002, the petitioner was charged with malicious destruction of property and theft before the Chief Magistrate's Court (Kibera). The applicant filed a not guilty plea. At the trial, the prosecutors called their witnesses, and the applicant was found to have a good case, so he was placed in his defense, where he declared his intention to call four witnesses. After two defence witnesses appeared, the prosecutor notified the presiding judge that it wished to file nolle prosequi.

According to the applicant,while the alleged offense occurred in 2002, the nolle prosequi was filed in court after about thirty-one court appearances by the applicant and/or his counsel and 15 months since the case went to trial. As a result, the applicant alleged that the nolle prosequi could deprive him of his constitutional rights to a fair trial and a timely hearing.

The court held:

> *"Once nolle prosequi is filed, the Respondents will be free to charge the Applicant anew as the Respondents is allowed to do, which the applicant claims is an agonizing and prejudiced prospect for him. The third point to consider is that the Respondent could quietly decide not to pursue any further action against petitioner in this case. In the latter case, the applicant would've been unsure if to put the possibility of criminal charges deriving from the subject behind him or persist to have nightmares about the possibility of such accusations being leveled against him again..*[116]*Respondent Attorney General's decision to use the nolle prosequi procedure might be motivated by humiliation over his violation of section 85(2) of the C.P.C. instead of malice.*[117]*The nolle prosequi would just be a face-saving technique to end criminal trials then do nothing, leaving the*

[116]Ibid, 25.
[117]Ibid, 27.

*accused/applicant in limbo if or not he will face criminal prosecution again in the future. We have no issue in considering even the respondent's probable passive choice undesirable and contrary to public policy."*[118]

## 2.7 CONCLUSION

This chapter has shown that the exercise of control over criminal prosecutions by the State and, in particular, the power of *nolle prosequi* has been historically abused to the extent that it impacts the enjoyment of human rights and specifically the accused's right to a fair trial. Without sufficient checks, the power of *nolle pros*equi had been deployed improperly to the detriment of the accused's fundamental rights to remedy prosecutorial errors and shielding of prominent personalities from prosecution.

It has also been demonstrated that courts religiously upheld the absolute discretion that was vested in the AG to exercise *nolle prosequi* and seldom refused to assert an inherent mandate to supervise the AG. In fact, Courts were tolerant and accommodative to the extent of promoting the abuse of its processes by the AG.

The *Njogu case* and the few cases that came after it attempted to police the AG, but in the then prevailing dispensation under the 1969 Constitution, these cases presented a rare break from the norm. It is for this reason that necessitated reforms under the 2010 Constitution. As will be seen in the next chapter, the new provisions attempt to remedy and cover the legal lacunas that existed before. Key among these were reforms that were in line with the *Njogu case*.

[118] Ibid, 28.

## CHAPTER THREE: THE NEW CONSTITUTION AND THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS: THE LEGAL FRAMEWORK IN THE CONTROL OF PROSECUTIONS AND ENTRY OF *NOLLE PROSEQUI*

### 3.1. INTRODUCTION

This chapter principally seeks to analyse the efficacy of the current Kenyan legal framework with respect to *nolle prosequi*. It compares and contrasts the provisions of the 1969 Constitution versus the 2010 Constitution. This chapter also seeks to critically examine the new office of the DPP as provided by the 2010 Constitution. This chapter lays the jurisprudential foundation of the State control of criminal prosecutions in general, puts in perspective the state's entry of *nolle*

*prosequi* in criminal cases, and investigates the legal framework of control of criminal prosecutions in Kenya. This chapter will also seek to analyse the exercise of the power of *nolle prosequi* in the United States and in South Africa for the sole reason of drawing comparisons as well as appropriate lessons Kenya can borrow in order to reform any deficiencies in its legal framework with regards to *nolle prosequi*.

## 3.2 LEGAL FRAMEWORK FOR THE CONTROL OF PROSECUTIONS AND NOLLE PROSEQUI IN KENYA

To appreciate the basis of criminal prosecutions and State control of the same, it is imperative to inquire into the emergence of the civilised and organized society, law and governance. This is expounded by contextualizing the social contract theory as the underlying concept behind the establishment of the criminal justice system. Through the mechanism of the social contract, the man gave up his right to retaliate for harm done to him by others to the State to take action on his behalf.[119]

The State has the power to punish and prosecute offences for this purpose. Because the state is in charge of criminal prosecution, it will naturally want to keep a tight grip on the process in order for it to operate in its favor. In this view, the state not only passes laws to define what constitutes criminal action, but also creates procedural tools to enforce the norms, ensuring that the processes are always aligned with the nation's interests.

It's important to remember that the State's primary interest in a criminal charge should be to ensure that justice is served by ensuring the conviction of any deserving perpetrator; this is the

[119] Supra Chapter 1.

responsibility that the State assumes under the social contract in exchange for the civilian's promise to obey the law.

As a result, prosecution control is focused toward guaranteeing that the State's interests in the litigation proceedings are served. Prosecution oversight is required to guarantee that only cases with prima facie facts to justify a conviction are brought to trial. Controlling public prosecution doesn't really exist in isolation; it should be done within a legislative structure by entities that have been formed and acknowledged by the law. In most Commonwealth jurisdiction, the Attorney General and the Director of Public Prosecutions are indeed the keepers of the public interest in public trials.

The Department of Public Prosecutions delegated prosecution authority to the Attorney General, as provided in Section 26 of the 1969 Constitution. This law gives the Attorney General the power to terminate any criminal proceedings launched or carried out by the State or a private citizen at any moment. As a result, the State's decision to stop criminal proceedings was based on constitutional grounds, particularly the State's power to enter a nolle prosequi in any criminal prosecution.

Section 82(1) of the Criminal Procedure Code,[120] on the other hand, established the legal basis for entering *nolle prosequi*. The Attorney-General could enter a *nolle prosequi* in just about any criminal trial at any juncture before ruling or conviction, as the case may be, by asserting in court or notifying the court in writing that the Republic does not intend for the court hearings to continue, and the suspect is hereby released in reverence of the charge for which the nolle prosequi has been entered. If the person has been sentenced to prison, he must be released, and if

[120]Cap 75, Laws of Kenya

he has been on bail, his recognizance must be dismissed; however, the release of an alleged offender must not prevent future charges based on identical facts."

The Office of the Director of Public Prosecutions (ODPP) separated from the State Law Office on July 1, 2011, when the DPP was formed as a public authority in responsibility of prosecuting all criminal offenses under Article 157 and 158 of the 2010 Constitution. With the goal of assuring a modernized, competent, and responsible prosecution system, Article 157 of the Constitution set up an independent ODPP.

### 3.2.1. The 2010 Constitution of Kenya

As outlined above, Article 157 Constitution establishes the ODPP, gives the required qualifications for the holder of the office and his tenure. It also provides for the scope of investigative powers into criminal cases in coordination with the Inspector General of Police.

The ODPP is a separate and distinct office from the office of the AG. To further prevent influence, the ODPP is established as an independent constitutional body, and its head, the DPP, his tenure of office. The DPP is a presidential appointee after a process of recruitment and recommendation of the PSC and is subject to parliamentary vetting and approval.[121] The DPP does not serve at the pleasure of the President as his term only terminates upon his resignation, his removal subject to Article 158 of the Constitution[122] , and/or upon the end of his maximum

[121] The Constitution of Kenya, Article 157 (1).
[122] (n 21).

eight (8) year term.[123] In this sense, the vulnerability to influence the chief prosecutor of Kenya is greatly diminished.

The provisions of Article 157 are a paradigm shift from the previous constitutional regime in regard to the powers of *nolle prosequi*. Unlike before, the State's prosecutorial powers are now conferred on the ODPP.

In a break from the past, under the new constitutional dispensation, the DPP can only exercise the power of *nolle prosequi* with the permission of the court.[124] Moreover, the DPP can only take over criminal proceedings instituted or undertaken by another person or authority with the permission of the person or authority.[125] Further, Article 157 (11) of the Constitution provides for an overriding mandate that the ODPP must, in the exercise, all its functions have regard to the public interest, the interest of the administration of justice, and must always endeavour to prevent and avoid abuse of the legal process.There is no judicial oversight over the exercise of the power of *nolle prosequi*. This is a remedial recognition of the fact that the power has been abused by previous AGs that led to a miscarriage of justice.

Additionally, the Constitution provides for further limits on the power and consequence of entering *nolle prosequi* at Article 157 (7). Where *nolle prosequi* is entered after the close of the prosecution's case, the accused stands acquitted. Previously the entering of *nolle prosequi* at any stage before judgment amounted only to a discharge and did not bar the subsequent re-charging of the accused on similar charges and facts. However, in the current constitutional dispensation, when *nolle prosequi* is entered after the close of the prosecution's case, similar proceedings

[123]The Constitution of Kenya, Article 157 (5).
[124] Ibid, Article 157 (7).
[125] Ibid, Article 157 (6) (b).

on the same facts cannot be reintroduced in the future against an accused. This is important because this will prevent instances where the prosecution is using the power of *nolle prosequi* to enable them to perfect their case upon the realization that the accused Defence is potent enough to guarantee an acquittal and/or raised a reasonable doubt as to their guilt.

### 3.2.2. The Office of the Director of Public Prosecutions Act

In a bid to give effect to Article 157 and 158 of the Constitution, Parliament enacted the Office of the Director of Public Prosecutions Act (ODPP Act).[126] This Act outlines the scope of the ODPP's power, its authority, independence and sets out the functions of the DPP and other directors and employees of the ODPP.

The ODPP Act seeks to ensure the operation & functionality of the ODPP and entails delegation of powers of *nolle prosequi* by the DPP to the appointed public prosecutors who prosecute matters on behalf of the State as instructed by the DPP. Section 4 of the ODPP Act sets out the principles guiding the ODPP in the execution of its mandate as is provided by the Constitution. Thus in fulfilling these duties, the ODPP must take into account; the diversity of Kenyans, objectivity and gender equality, fundamental justice rules, public faith in the Office's integrity, the need to dispense the Office's activities on behalf of Kenyans, the need to fulfil the cause of justice, thwart abusive behaviour of the judicial process and national good, safeguards of the person's sovereign rights, securing the strict adherence of principles of democracy, and promotion of constitutionalism.

[126] Act No. 2 of 2013.

The Act created an ODPP Advisory Board to advise the ODPP on a variety of topics, including personnel selection, promotions, terms of service, discipline, and other items presented to it by the DPP. It empowers the ODPP to hire personnel, negotiate their terms and conditions of employment with the Salaries and Remuneration Commission (SRC), and directly negotiate its budgetary demands with the National Assembly.

### 3.3. MANDATE, POWER, AND FUNCTIONS OF THE ODPP

The ODPP is mandated to undertake the following functions:

#### 3.3.1. Constitutional Functions

1. To exercise prosecutorial powers by instituting and undertaking criminal proceedings against any person. These proceedings may be instituted before any court other than a court-martial, taking over and continuing any criminal proceedings instituted or undertaken by another person or authority, and discontinuing at any stage before judgment is delivered any criminal proceedings.[127]

2. To direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct;[128]

3. To ensure due to regard to the public interest, the interest of the administration of justice, and the prevention and avoidance of abuse of legal process.[129]

#### 3.3.2. Other Functions

The DPP's other functions include:[130]

[127] The Constitution of Kenya, Article 157 (6).
[128] Ibid Article 157 (4).
[129] Ibid Article 157 (11).

a) Advising the Police and other law enforcement agencies on possible prosecutions;
b) Representing the State in all criminal applications and appeals;
c) Engaging private legal practitioners to assist in the prosecution mandate when the need arises;
d) Inspecting prosecution operations;
e) Undertaking extradition proceedings;
f) Offering mutual legal assistance to other jurisdictions;
g) Undertaking action to ensure the tracing, seizure, and forfeiture of assets connected to criminal proceedings;
h) Disseminating and enforcing the National Prosecution Policy (NPP) and the Code of Conduct for Prosecutors;
i) Ensuring control, supervision, regulation, and gazettement of public prosecutors;
j) Carrying out any necessary functions that are incidental to instituting and conducting criminal prosecutions;
k) Addressing parliamentary questions relating to the administration of criminal justice;
l) Advising Government Ministries, Departments, and State Corporations on matters pertaining to the application of criminal law;
m) Addressing complaints raised by members of the public,
n) Watchdog bodies and other institutions; and
o) Undertaking other administrative roles relating to the efficient and effective administration of the criminal law in the country.

[130] (n 124), section 5.

### 3.4. THE CODE OF CONDUCT & ETHICS FOR PUBLIC PROSECUTORS

Public Prosecutors working under the DPP are guided by a code of conduct & ethics to ensure the manner of the dispensation of prosecutorial powers in the court meets the objective of delivering justice as seen in the eyes of the public.

Prosecutors, therefore, are bound by this code in undertaking their duties and powers. They are expected to observe the dictates of the code, which include acting.[131]

a) within the limits of the law;
b) with special attention to human rights;
c) with respect for human dignity;
d) fairly, impartially, objectively, and without fear;
e) in a way thatensures accountability;
f) in a conscientious & dynamic way;
g) according to their instructions & informed 3rd Party information; and
h) with integrity required of a public officer.

### 3.5. CRIMINAL PROCEDURE CODE

The Criminal Procedure Code (CPC)[132] expressly provides for the appointment of public prosecutors and the conduct of prosecutions by prosecutors appointed by the State.[133]

Section 182 (1) 1of the CPC deals with the exercise of the power of *nolle prosequi* and states that the officer-in-charge of prosecutions (formerly AG, now DPP) may apply to the court, either

[131] Code of Conduct & Ethics for Public Prosecutors (2013) NL.
[132] Chapter 75, Laws of Kenya.
[133] Ibid, section 85-88.

orally or in writing, to drop any criminal proceedings at any time before judgment. The accused will thereafter be released from the charges for which a nolle prosequi has been entered. However, such a release would be without prejudice and would not prevent the accused from facing criminal charges in the future based on the same circumstances.

Thus, the prosecutor must make a formal application in court presented orally or in writing to the judicial officer presiding over the matter that the prosecution wishes to inform the court that the evidence proves insufficient in prosecuting the accused person(s) and that the prosecution does not wish to continue with the matter.

It is expected that in making such an application, the Prosecutor is being guided by the code of conduct & ethics and that his motivation remains the end of justice.

It is instructive to note that section 82 of the CPC has not been amended to conform with the requirement of Article 157 of the Constitution. This section still assumes that the AG is the chief prosecutorial officer, whereas those prosecutorial functions are now vested in the ODPP. Also, this section does not contain the important limitation provided under Article 157(7) of the Constitution with respect to the acquittal of the accused where *nolle prosequi* is entered after the close of the prosecution's case.

### 3.6. CURRENT LEGAL TEST

The current legal threshold that the prosecution must surmount in exercising the power of *nolle prosequi* as been posited by the Constitution is that the prosecutor must seek leave of Court. This requirement enhances judicial supervision, strips the State of absolute discretion, and enhances checks and balances in line with the spirit of Montesquieu.

Article 157(11) of the Constitution establishes the legal principles that must be considered before the leave is granted. It must, however, be noted that these principles are couched in general terms and do not exclusively apply to *nolle prosequi* but are principles that should guide the ODPP in the execution of all its functions and duties.

### 3.6.1. Public interest

It is the responsibility of democratic governments to protect and safeguard the lives of their citizens. One of the purposes that the law serves is to apply justice in the interests of the public. If not swiftly, then certainly. This is a fundamental tenet of the legal system and, more specifically, the criminal justice system. Public interest is a set of principles, values, and objectives that are anchored on notions of social justice and the desire to see the law as an instrument of social change. The role of the prosecutor excludes any notion of winning or losing; it is to be efficiently performed with an ingrained sense of the dignity, the seriousness, and the justness of judicial proceedings. It is said that the prosecutor acts in the general public interest.[134]This is where the prosecutor's ultimate loyalty and responsibility lie. The prosecutor must consider this factor before requesting leave of court, and consequently, Courts' will consider it before granting or refusing leave to enter a *nolle prosequi.*

Patrick Kiage, in his book, has posited some public interest considerations that guide a prosecutor when assessing whether or not to prosecute. These include but are not limited to the seriousness of the offence, the interests of the victim and the community at large, and the circumstances of the offender.[135]

[134] *Boucher v The Queen* (1954) 110 CCC 263, 270

[135] Patrick Kiage, *Essentials of Criminal Procedure in Kenya* (Law Africa, 2010) 55

### 3.6.2. Administration of Criminal Justice

Administration of criminal justice refers to the process that ranges from crime detection, apprehension, pre-trial, prosecution, release, and punishment. Crime has always been regarded as a moral wrong and conduct demanding retribution. The law assumes that in the absence of evidence to the contrary, a person though suspected of committing an offence is deemed innocent until proven guilty. In this respect, justice demands that any person accused of any offence is accorded due process.

As a result, criminal justice must take into account the interests of the accused, the victim, and society as a whole. In an ideal social system, the State, prosecuting authorities, and law-abiding citizens are all members of the same society. The supreme obligation of courts is to maintain public trust in the administration of justice. It is our responsibility to defend and protect the "majesty of the law." Dueadministrationofjustice is acontinuousprocess; it is not limited to1the determination1of1a1single1case; it safeguards the Court's capacity to function indefinitely.

The primary goal of criminal law is to protect society against criminals. The prosecutor must examine thecomplaint, thewitnessstatements recorded, the documentary1evidence, and other1material in order to determine1whether or not1there is enough1evidence to support a credibleprosecution. As opposed to the standard of beyond reasonable doubt, the prosecutor must be convinced that there is a genuine chance of conviction. When the prosecutor determines that there is insufficient evidence to gain a conviction, he may postpone the prosecution until he is satisfied that there is sufficient evidence to support a trial. However, under present law, if the prosecution believes that there is insufficient evidence to continue proceedings during the trial but before the conclusion of the prosecution's case, a *nolle prosequi* may be used to end the proceedings and allow the prosecution to perfect its case.

In this instance, the prosecution should convince the Court that in the interest of criminal justice, to prevent the accused from walking scot-free, it be allowed to discontinue proceedings and be able to firm up its evidence. Obviously, as we shall demonstrate later, this may be subject to abuse. Be that as it may, in applying this test, the Court must be guided by the broad rhetorical question which is whether the basic purpose of our criminal justice system, which is predominantly to determine the guilt or innocence of the accused, is to be used towards the achievement of any different purpose.

### 3.6.3. Prevent abuse of the Court process

In the case of *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others,*[136] the Court attempted to define the concept of abuse of the Court process as follows:

> *"What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of 'abuse of process.'* ***It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective." (Emphasis added)***

Courts have an inherent power to prevent abuse of their process. Criminal justice institutions must maintain their impartiality and dignity. Their independence is vital in preventing its abuse in the pursuit off of personal civil feuds and individual vendettas that find their ways to the criminal Courts. It is through this mandate of the court to guard its process against being

[136] Civil Appeal No. 25 of 2002 [2002] eKLR.

abused or misused or manipulated for ulterior motives that the inherent power of review is invariably invoked so as to zealously guard the dignity of the Court.

As was demonstrated by the historical background, the power to enter *nolle prosequi* has been used numerously for ulterior motives. As such, the constitution dictates that before the Court grants leave, it must be satisfied that *nolle prosequi* is not an instrument for the abuse of the Court process.

### 3.7. APPLICATION-POST 2010 PRECEDENT

There have been but a handful of cases decided in the post-2010 era applying the constitutional principles as set out above. They have, however, not provided exhaustive rationale in explaining the legal threshold as set out in Article 157 (11) of the Constitution. The common thread in these cases is that courts have held that when *nolle prosequi* is entered before the close of the prosecution's case, its effect is that the accused would be discharged from the charges he faced, but the prosecution could re-charge him again in the future on similar charges and facts. Additionally, Court has insisted that before the Court grants leave for entering of *nolle prosequi*, the prosecution must state its reasons definitively.

In *Republic v Wickliffe Otieno Ngode Alia Toti and Tobias Odhiambo Otieno,*[137] two applicants sought orders barring the continuance of their trial in a criminal case in which they had been charged with the offence of robbery with violence before the Chief Magistrate in Mombasa. They argued that this trial violated the rule on double jeopardy as they had already been charged with the same offence in another previous case. The State, however, submitted that there was no double jeopardy because, in the first trial, the charge was terminated by way of *nolle prosequi;*

[137] Misc. Crim. App. No. 2 of 2011 [2011] eKLR.

thus, there was no bar to subsequent charge because the withdrawal was before the close of the prosecution's case.

The Court agreed with the State's submissions and held that the effect of *nolle prosequi* before the close of the prosecution's case was not an acquittal but merely a termination of the charges which an accused person faced.[138]

In *Republic v Enock Wekesa and Michael Biketi Watah,*[139]the prosecution had sought to reverse an order by the Kitale Senior Principal Magistrate refusing the entering of a *nolle prosequi* with respect to Criminal Case No. 4379 of 2009. The two accused persons, in that case, were charged with three counts of robbery with violence and defilement. The trial commenced before the Senior PrincipalMagistrate, and the Senior PrincipalState Counsel quickly filed a writ of *nolle prosequi* to end the criminal proceedings against the two defendants. The learned Trial Magistrate dismissed the writ *of nolle prosequi* on the basis that no reasons were provided for consideration as required by the Kenyan Constitution2010.

In this reference, Justice Martha Koome upheld the trial magistrates ruling holding that pursuant to the current constitutional dispensation, the prosecution must always provide reasons for the Court's consideration before the leave is granted for a writ of *nolle prosequi* is allowed. Koome J. was also of the opinion that the provisions of Articles 157 and 158 of the Constitution overrode section 82 of the CPC. Further that it was no longer the preserve of the High Court to determine the propriety of *nolle prosequi*. Thus, any trial Court, including the lower court, had jurisdiction to accept or refuse the entering of a *nolle prosequi*.

[138] This position was further restated in *Republic v DPP & 3 Others*, Judicial Review No. 107 of 2011 [2012] eKLR.
[139]Misc. Crim. Rev. No. 267 of 2010 [2010] eKLR

### 3.8. POTENTIAL FOR ABUSE

The Constitution has made provisions for necessary limitations on the power of *nolle prosequi*. However, as history has shown, we must view these changes with caution, for there is still potential for abuse.

Even in the current dispensation, the prosecution may still move the Court and withdraw criminal proceedings without prejudice before the close of its case upon realising that it has a weak case. In this case, *nolle prosequi* would once again be used as a tool to pepper through prosecutorial incompetence and may be used to unfairly subject an accused to re-litigation of their criminal matters for as long as the Court would allow the prosecution to perfect its case. Further, save for the general provision at Article 157 (11) of the Constitution as to the matters the ODPP must consider in executing its constitutional mandate, the Constitution or any other enabling legislation, regulation, or guideline are silent on the threshold for which the prosecution must surmount in order to show that it is exercising its discretion judicially. In the absence of such guidelines, the exercise of the power of *nolle prosequi* is left to the wisdom of the ODPP and the unfettered discretion of the Court. Thus, the ODPP may work very well at instances when the occasion calls for its ropes in Courts in continuing the historical abuse of this power.

If the fate of the individual versus the DPP's *nolle prosequi* appears gloomy, a more deadly consequence will be brought to bear where the beneficiary is a corporation. It is no longer in doubt that corporations do commit criminal offences. Corporations exist independently of their members. Thus, corporations can act and be at fault in ways distinct from their individual members. As such, corporate responsibility is primary and not dependent on individual

responsibility[140]. Because the duty is imposed only on the company, it may be unjust to convict anyone else of failing to perform the act. Corporations should therefore be accountable for their actions, knowing or not knowing about their conduct, and failing to prevent harm.

This rationale for corporate criminal liability[141] is necessary because it ensures that a company's offence is not left unpunished, especially when no individual within the company can be easily identified. In any event, courts would have no problem imposing fines proportionate to the gravity of the offence, even if the fine was out of proportion to the individual's means. Convicting the corporation also serves to warn the public of the wrongdoings committed in its name, such as selling prohibited or unsafe products, conspiring against the public, or operating passenger buses with defective brakes.

Similarly, corporation may be liable for negligence if it fails to take adequate precautions to ensure that the commission of harm is prevented.[142] It may also be appropriate to impose criminal liability for the fault on the part of the corporation in failing to act appropriately. This is because corporations act in a larger scale than individuals and the chances of their actions causing harm are very high. Someoffenses need an intention to commit the offence or some other subjective mental status such as awareness or recklessnesswith respect to the conduct

[140] This is at the core of the 'direct liability' model which has been popularized since 1944. This approach seeks to eliminate any link between corporate and individual liability. A corporation's criminal liability is determined by its organizational conduct and fault, regardless of whether any individual has committed a crime.

[141] The direct liability approach proposes various liability forms. First, some focus on the corporation's failure to respond appropriately to the personnel's offense, while others focus on corporate responsibility for original offenses committed by the corporation. Second, while some focus on negligence-based offenses, others see corporate policy and culture as potential sources of subjective fault. Another point of contention has been that criminal responsibility can flow from an individual to a corporation, as well as within the corporate structure. Regardless of its form, the direct liability model represents a radical departure from the nominalist theory's traditional approach.

[142]If it is proven that a company's corporate culture directed, encouraged, tolerated, or led to non-compliance with the law, the company may be held accountable. The Model Criminal Code defines 'corporate culture' as "an attitude, policy, regulation, course of action, or practice prevailing within the body corporate."

of the offence, as a matter of statutory1prescription or entrenchedcommon law.The liability of the corporation for an offence resulting from negligence should be addressed along the lines of the general principles of negligence.

Where a corporation is under a duty to guard against the occurrence of a criminal act, which duty it fails to discharge, it should be held criminally liable. But like all other negligent faults, the harm should be that which is reasonably foreseeable.

Given the sheer commercial muscle of the corporation, its capacity to influence the DPP for a writ of *nolle prosequi* to terminate criminal proceedings against it cannot be ignored. Indeed the fact that there is hardly any criminal prosecutions whether by the DPP or by way of private prosecutions against corporations in Kenya is testimony to the potency of the corporation.

The fact that there has not been any precedent to expound and give effect to the principles set out in Article 157 (11) is further cause for concern. As such, what we have is general terms for consideration that, unless specifically and definitively defined, remain but a general obligation that does not provide sufficient thresholds.

It is thus instructive that this study looks to other jurisdictions in order to ascertain further safeguards that Kenya may borrow in order to plug the gaps in its laws and reform the exercise of *nolle prosequi* so as to eliminate any potential for abuse.

## 3.9. LESSONS FROM THE UNITED STATES OF AMERICA AND SOUTH AFRICA

### 3.9.1. United States of America (USA)

The United States has a federal system of government, where all the fifty (50) States operate autonomously, and a federal government which handles matters relating to foreign affairs, inter-

state issues, or matters where an individual has a case against a State. The power of *nolle prosequi* operates at both the Federal level and the State level.

In the conduct of federal prosecutions, the principal law is the Federal Rules ofCriminal Procedure. The control of criminal prosecutions by way of *nolle prosequi* is provided for under Rule 48 (a) of the Federal Rules of Criminal Procedure as follows:

> *"The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during the trial without the defendant's consent."*

Thus, before the termination of federal criminal proceedings, the law mandates the prosecutions to seek not only the leave of court but also the consent of the accused where the trial has begun in earnest. In this sense, the power to enter *nolle prosequi* is not only left to the whims of the prosecution and/or the unfettered discretion of the Court but also the person facing the charge has a say in the process.

This is a novel position that may be adopted in Kenya and applied in two folds. *Firstly*, before the leave is granted for *nolle prosequi* to be entered, the accused person's consent must be sought, and his objection(s), if any, must be taken in with the same weight as the reasons propounded by the prosecutions for entering *nolle prosequi*. *Secondly,* to prevent the shielding of prominent personalities from prosecutions, the consent and objections of the complainant must also be sought. In this sense, the complainant is allowed the opportunity to take up the proceedings in the form of private prosecution.

The law in the USA is such that in instances where it is proven that the entering of *nolle prosequi* would be an infringement of the accused right to a speedy trial, superior courts have the power to quash leave granted to the prosecution to enter *nolle prosequi*. Thus, in *Klopfer v North Carolina,*[143] the petitioner sought an order of certiorari from the Supreme Court to bring into the Court and quash the decision of the North Carolina State Supreme Court and the trial court, which granted leave to the prosecution to enter a motion of *nolle prosequi* in relation to criminal charges against him. The Supreme Court reversed and remanded the decision of the State Supreme Court and held that by indefinitely postponing prosecution on the indictment over the petitioner's objection and without stated justification, the State denied the petitioner the right to a speedy trial guaranteed to him by the Sixth and Fourteenth Amendments of the US Constitution.[144]

This study would adopt this position and recommend that Kenyan Courts, in considering applications by the prosecution to enter *nolle prosequi*, must weigh the prejudice the accused stands to suffer *vis-a-vis* the prosecutorial mandate. Where the prejudice visited on the accused is greater, all applications for *nolle prosequi* should be turned down.

Perhaps even more encouraging and for which this study will readily recommend for adoption by Kenya Courts is the manner with which USA Court has rebuked and frown upon the use by the prosecution in using *nolle prosequi* as a tool to perfect their cases and repeatedly subject accused criminal proceedings. This point was emphasized in *Black v North Carolina,*[145]where the Court frowned upon the prosecution's unfettered power to terminate criminal proceedings. The court was alive to the practice of State prosecutors terminating criminal proceedings for their personal

[143] 386 U.S 213 (1967).
[144]Ibid.
[145] (1953) 344 U.S 424.

convenience as opposed to doing so in the interest of justice. In the dictum of the learned trial judge, Justice Frankfurter stated:

> *"A State falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order for a prosecutor who has been incompetent or casual or even ineffective to see if he can do better a second time."*[146]

The rationale behind the rule is simply to protect an accused person from the oppressive tendencies of the State. The State has vast resources. If unchecked, the State can perpetually deprive an accused person of his personal liberty through successive frivolous trials. Black J. in the Supreme Court in the case of *Green v United States*[147] stated that:

> *"The underlining idea, one which is deeply ingrained in at least the Anglo - American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."*[148]

### 3.9.2. South Africa

The National Prosecuting Authority (NPA), established under the Constitution of South Africa,[149] is a single national prosecuting authority in the South African Republic. The NPA is

[146] Ibid, 429.
[147] (1957) 355 U.S 184.
[148] Ibid, 187-188
[149] Constitution of the Republic of South Africa, art 179.

further structured in terms of the National Prosecuting Authorities Act (NPAA).[150] The NPA is headed by the National Director of Public Prosecutions (NDPP). The NDPP is both an executive and judicial position because the office performs both administrative roles and functions of the judiciary, such as *nolle prosequi*, which means that the office is also responsible for criminal justice.[151] The NPA is similar in structure to the ODPP in Kenya. Both institutions are Constitutional offices and are therefore clothed with immense power.

The NPA of South Africa has the power to institute, conduct and discontinue proceedings.[152] These powers are exercised by the Deputy National Directors subject to the control and directions of the NDPP.[153]Therefore, pursuant to the Constitution and the NPAA and section 6 of the South African Criminal Procedure Code (CPC)[154], the NDPP has the ultimate control over the exercise of *nolle prosequi*. The NDPP also may review a decision to prosecute or not to prosecute, after consulting the relevant Directors of Public Prosecutions in various regions and after taking representations within a period specified by the NDPP, from the accused person, the complainant, or any other person or party whom the NDPP considers to be relevant.[155]

In the case of *R v Sikumba,*[156] the South African court recognized the power of the prosecution with respect to its prosecution mandate. In the dictum of the learned Justice De Villiers:

---

[150] Act No. 32 of 1998, Laws of South Africa.

[151] L Wolf, 'Pre- and Post-Trial Equality in Criminal Justice in the Context of the Separation of Powers' Vol 14 No. 5 (PER 2011) 59, available at<http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-per/issuepages/2011volume14no5/WolflanguageeditedDOC2011%2814%295.pdf>(Last accessed 8 August 2021).

[152] National Prosecuting Authorities Act, section 20(1).

[153] Ibid, section 20(2).

[154] Act No. 51 of 1977, Laws of South Africa.

[155] Constitution of the Republic of South Africa, s 179(1), (5).

[156] [1955] 3 S. A. 125, 127

*"The prosecutor, as the representative of the Solicitor-General, is the dominus litis. It is within his powers to withdraw the charge at any stage of the proceedings, and no court can prevent him, just as no court can force him to prosecute."*

In South Africa, *nolle prosequi* is used as an exercise of prosecutorial discretion. An NDPP may enter *nolle prosequi* in the following situations:[157]

(a) Where the prosecution evaluates the contents of a file and establishes that there is too little evidence to warrant a prosecution;

(b) Where the victim cannot be traced to give oral testimony and firmly set out the prosecution's side of the case; or

(c) Where the victim and the accused agree on an out-of-court settlement, e.g., in rape cases where the individuals were in an amicable relationship and seek to solve the matter outside the court system.

Pursuant to section 6 of the South African CPC, *nolle prosequi* may be entered at any time before conviction. However, the effect of the *nolle prosequi* is different depending at what stage of the criminal proceedings it is entered. If *nolle prosequi* is entered before an accused takes a plea, the accused is discharged, and the prosecution may at a later date reintroduce similar charges on the same facts.[158] If, however, *nolle prosequi* is entered at any time after the accused

[157] L Vetten, R Jewkes, R Sigsworth, N Christofides, L Loots, and O Dunseith, 'Tracking Justice: The Attrition of Rape Cases Through the Criminal Justice System in Gauteng.' (Tshwaranang Legal Advocacy Centre, the South African Medical Research Council and the Centre for the Study of Violence and Reconciliation 2008) 49, available at<http://www.mrc.ac.za/gender/Tracking_Justice_Web.pdf>(Accessed on 8 August 2021).
[158] South African CPC, section 6 (a).

has taken a plea, but before conviction, the accused will be acquitted, and no subsequent criminal proceedings may be commenced as against the accused on similar charges and/or facts.[159]

The position in South Africa is a complete departure from that which persists in Kenya. It is, however, a novel position considering that in Kenya, the prosecution entry of *nolle prosequi* at any time before the close of its case is not a bar to the re-introduction of those proceedings in the future.

Thus, as already pointed out before, the prosecution in Kenya may utilize this as many times as the Court will allow until they perfect their case. However, if the South African position were to be applied in Kenya, it would mean before the accused has pleaded to the charge, the prosecution must be very vigilant and ascertain the strength or weaknesses of their case before they proceed to trial.

This is important because if the prosecution determines after plea taking that their case is weak and enters a *nolle prosequi*, they would be barred from subsequently introducing similar charges on the same facts against the accused. In this regard, where the South African position be adopted in Kenya, the prosecution would be obliged to critically evaluate their cases as against the evidence in their possessions and determine the potential for success before mounting the prosecution. This is because they will no longer be able to utilize *nolle prosequi* as a means of perfecting their cases at any stage of the proceedings after the taking of plea.

[159]Ibid, section 6 (b)

## 3.10. CONCLUSION

For too long, our basic law failed to protect the accused person from the whimsical and arbitrary application of *nolle prosequi*. By granting the then office of the AG absolute discretion in the exercise of *nolle prosequi*, it facilitated an improper use of discretion.[160] It was an epoch under which neither the trial court nor the accused person had a say whenever the AG elected to exercise his powers to enter *nolle prosequi*. The courts, including the then highest court in the land, the Court of Appeal, would dare not intervene in the criminal proceedings where the AG entered *nolle prosequi*.[161] In those circumstances, therefore, this discretion was culpable of abuse and denied victims of a crime their deserved justice.

The 2010 Constitution came with much-needed checks on the exercise of the power of *nolle prosequi*. With the transfer of the power of *nolle prosequi* to an independent DPP enjoying guaranteed tenure of office and the introduction of the requirement of leave before *nolle prosequi* is entered, Kenya has made great strides in limiting the historical abuse of *nolle prosequi*.

However, as it has been shown, the reforms brought by the 2010 Constitution are not substantial and do not bridge the gaps that were exploited in the 1969 Constitutional dispensation. There is still potential for abuse. Chief among the deficiencies that still exist is the lack of guidelines to give force to the new constitutional dispensation. In this respect, this chapter has highlighted lessons Kenya can draw from the United States as well as from South Africa for purposes of providing further reforms so as to prevent any further abuse of the power of *nolle prosequi*.

[160] Section 26 of the 1969 Constitution read together with section 85 of the CPC.
[161] *Roy Richard Elirema & Vincent Joseph Kessy v Republic* Criminal Appeal No.67 of 2002

# CHAPTER FOUR:CONCLUSIONS AND RECOMMENDATIONS

## 4.1. INTRODUCTION

In this chapter, we shall first and foremost analyze the main findings of the study, on which premise we shall proceed to propose a wide range of reforms to the law of *nolle prosequi* and set the stage for the implementation of the respective Constitutional and legislative reforms with a view of enhancing the criminal justice in Kenya, and by extension safeguard of the fundamental rights of every citizen, regardless of class, ethnicity or any other subjective criteria.

## 4.2. SUMMARY OF STUDY

The study began with providing a background to the problem by identifying the historical abuse of the power of *nolle prosequi* under common law and subsequently adopted under the 1969 Constitution. The study has also analysed the efficacy of the current legal framework guiding the exercise of the power of *nolle prosequi.* The study then concisely, not only outlined the research problems but also set out the hypothesis under inquiry. Additionally, the study outlined in detail

the two theories of criminal justice and social contract, which collectively inform the basis of the arguments and point of view elucidated in the entire study.[162]

Chapter Two of the study outlined in great detail the evolution of the power of *nolle prosequi* through common law and, more specifically, in the 1969 Constitutional dispensation. This chapter analysed the consequences flowing from granting the AG absolute and unfettered discretion in the exercise of *nolle prosequi*. In this regard, this chapter specifically highlighted the various instances the power of *nolle prosequi* was utilized to mask prosecutorial incompetence and further to shield prominent personalities from prosecution.[163]

Chapter Three provided an analysis of the efficacy of the current legislative framework with respect to *nolle prosequi*. This chapter set out the reforms introduced by Articles 157 and 158 of the Constitution and all the enabling statutes that give effect to these constitutional provisions. It wasnoted here that these provisions provided necessary limits to the exercise of the power of *nolle prosequi* by requiring that the prosecution must seek leave of court before*nolle prosequi* can be entered. It was further highlighted that in the current dispensation, the entering of *nolle prosequi* after the close of the prosecution's case had the effect of granting the accused an acquittal. The foregoing being said, the chapter also made a strong case in pointing out that these reforms were not in themselves substantive enough to bridge all the deficiencies of the 1969 Constitution. Specifically, it was noted that the Constitution only provided general guidelines as to the principles the prosecution must consider in executing its prosecutorial mandate. In this sense, this chapter rationalized that to remedy this deficiency there is need for the formulation of specific guidelines to give effect to these constitutional thresholds. Finally, this chapter outlined

[162]Supra Chapter One.
[163]Supra Chapter Two.

appropriate lessons Kenya can learn from the USA and South Africa in making a case for the provision of further limits to the power of *nolle prosequi* in order to prevent abuse.

### 4.3. FINDINGS

The researcher, through this study, noted some peculiar features with regards to the exercise and impact of *nolle prosequi* in Kenya. These are:

(a) There have been numerous historical instances where the power of *nolle prosequi* has been abused;

(b) The Constitutional provisions of *nolle prosequi* have watered down the power on account of uncertainty, and therefore, its effectiveness and impact in society is in question;

(c) The necessity of *nolle prosequi* is undeniable;

(d) The Courts' supervision of the power is absolutely imperative;

(e) The Courts' supervisory powers though important, are weak as the power to enter a *nolle prosequi* is a strict preserve of the prosecution;

(f) Many judicial officers have historically shied away from effectively supervising the exercise of the power by the prosecution and/or DPP;

(g) The power of *nolle prosequi* if not properly regulated may infringe on an accused's right to a fair trial depending on the context of its application;

(h) Article 157 of the Constitution is substantially deficient in terms of regulating the power;

(i) The Constitutional provision only provides a broad statement of the principle but lacks the flesh of legislation;

(j) Further, the said provision fails to delineate the manner in which the ODPP should exercise this great power that has been bestowed upon it so as to engender a clean break from its inglorious past;

(k) In this sense the Constitutional provisions with regard to the exercise of the power of *nolle prosequi*neither provide substantial nor definitive regulation of this power, and there is potential re-emergence of the historical abuse.

## 4.4. THE RATIONALE INFORMING THE REFORM OF THE LAW OF NOLLE PROSEQUI IN KENYA

The power of *nolle prosequi* undoubtedly plays an integral role in the administration of the criminal justice system. In its evolution, it was aimed at serving legitimate and lawful purposes. However, it is also clear that due to its discretionary nature, the power of *nolle prosequi*has and is prone to abuse. The frequent and haphazard entry of *nolle prosequi*, in most cases under controversial circumstances, has drawn condemnation from the bench, the bar, and the public.

It is submitted, in this sense, that doing away with the power of *nolle prosequi* may not be the solution. Indeed, when exercised properly, *nolle prosequi* has a useful role to play in the administration of the criminal justice system. The solution would therefore be to devise means and ways of controlling the power.

The Kenyan Constitution2010 presents one the one hand, a multitude of opportunities for various reforms in the area of *nolle prosequi*, but it still leaves a lot of grey areas on the other. The office of DPP created by the 2010 Constitution presents a new dawn for Kenyan criminal law. But as we have seen, there is a constant shift of power between the courts and the DPP, and this leaves the exercise of *nolle prosequi* still ambiguous and uncertain.

Leaving this ambit of the law open and without clear guidelines on its utility could lead to other forms of abuse of the legal process that are even greater than those witnessed before the promulgation of the new Constitution.

The law must, out of necessity, set up an impenetrable shield against the abrogation of human rights and justice and should not leave loopholes for its abuse because history has taught us to be wiser.

It is therefore imperative that any proposal for the reform of the *nolle prosequi* law must be anchored on the need to provide protection for the fundamental rights of the accused. It should aim at ensuring that the criminal justice system in the country is administered effectively and that the administration of justice is devoid of extraneous factors such as self-interest and political expediency.

### 4.5. PROPOSALS FOR REFORM OF THE LAW ON *NOLLE PROSEQUI*

We will begin to set the agenda for the modification of the *Nolle Prosequi* statute in this section. The study will look at specific sections of the law that are suggested to be amended and attempt to rationalize them while outlining the substance of the proposed reforms:

#### 4.5.1. Independence of the DPP

Even though the office of the DPP is separate from that of the Attorney General, it is important to expressly provide that the Attorney General shall not seek to interfere with matters handled by the office of the DPP.[164] The rationale behind this proposed paradigm shift would be to ensure

[164] One needs to be alive to the fact that the independence and security of tenure envisaged by the Constitution is in practical terms incapable of insulating the holder of the ODPP from a marauding Executive. When the Executive felt that it no longer needed the first holder of the ODPP under the Constitution of Kenya 2010, Mr Keriako Tobiko, it

that the office of DPP is not used to promote political and illegal interests. That means that the DPP will have the independence and freedom to take drastic action in prosecuting criminal matters. It will further cushion the officeholder from the dynamic political turbulence of the day.

Secondly, the DPP should be accountable to Parliament and duty-bound to submit progress and financial reports to the National Assembly at regular intervals for scrutiny. This will ensure that Parliament shall intervene in matters that are against public interest and engender accountability and transparency in this important public duty.

The independence of the office of the DPP is critical in the effective administration of criminal justice. Independence from the Executive arm of government is critical. It is thus proposed that the office of DPP procure the finances for the operation of the department directly from the National Assembly, after submitting a budget through the relevant parliamentary committee and as a direct vote from the Consolidated Fund. This would mean that the Executive, through the Treasury, cannot hold the DPP and his officers at ransom by withholding operational funds.

It is the view of this study that the application of Constitutional specialisation of powers and functions relating to criminal prosecutions would lead to enhanced efficiency by the office of the DPP and reduce instances of substandard and/or uncalled for prosecutions, including the many cases of improper application of *nolle prosequi* to cover up incompetence on the part of the Prosecution.

Indeed, the new Constitution of Kenya provides for the vesting of the powers of public prosecution, including *nolle prosequi* under a Constitutional office of the DPP. The new

---

procured his resignation and appointed him a Cabinet Secretary. This is the same fate that befell Chief Justice Bernard Chunga in 2003 when the NARC Administration procured his resignation.

Constitution grants the DPP tenure of office[165] and protects the DPP from bowing towards political pressure in order to protect his/her job or position. These are deliberate Constitutional imperatives designed to insulate the DPP from external influence.[166]

### 4.5.2. Functional rationalization of substance and procedure in exercise of the power of *nolle prosequi.*

In this Section, the thesis proposes certain changes in the design and procedural aspects of the law of *nolle prosequi* in Kenyan legal jurisprudence. It will address several aspects including, but not limited to:

(a) The time at which the prosecution may invoke this power and the consequences flowing therefrom;

(b) Restrictions of the discretion possessed by the DPP in this respect;

(c) Redefining the rights of the accused, complainant, and the power of the trial court with respect to *nolle prosequi;* and

(d) Setting a minimum threshold of judicially acceptable reasons for the approval of *nolle prosequi*.

Based on the foregoing, the proposed changes to the Constitution and other relevant legislation with regard to the power of *nolle prosequi* are as follows:

#### 4.5.2.1. The Time at which the prosecution may invoke this power

With due regard to the powers vested in the ODPP under Article 157 (6) of the Constitution of Kenya, it is proposed that the power to enter a *nolle prosequi* should be exercised by the

[165] Article 158(5) of the Constitution of Kenya, 2010.

[166] The implosion created by the tussle between the ODPP and the Directorate of Criminal Investigations in an attempt to charge Justice Sankale Ole Kantai in Nairobi HCCR No. 60 of 2019 Republic Vs Sarah Wairimu Kamotho *(the murder of Tob Cohen)* presents the classical example why the decision to prosecute is not an easy one.

DPP with leave of Court, at any time before judgment is entered by the trial court, stating cogent and appropriate reasons for such decision to the satisfaction of the Court. The entry of *nolle prosequi* should, however, have the following consequences:

i. If *nolle prosequi* is entered before the accused has taken a plea, the accused shall not be entitled to a verdict of acquittal in respect of that charge.

ii. If the *nolle prosequi* is entered at any stage after an accused has pleaded, but before judgment, the court shall acquit the accused in respect of that charge

iii. If the *nolle prosequi* is entered in circumstances contemplated by (ii) above, the DPP shall be precluded from using public interest, state security or incompleteness of investigations as a reason for the action.

iv. In the case of a private prosecution against a company, an entry of the *nolle prosequi* by the DPP should be disallowed especially where a criminal offence is disclosed and the DPP has declined to prosecute.

**4.5.2.2. Restricting the nature of the discretion**

In all instances, the trial court shall weigh the reasons forwarded by the prosecution against a minimum threshold set by law and adjudicated accordingly. The reasons must be based on law, and good practice and Courts must be able to discern and prevent any mischief and only allow any application of *nolle prosequi* on merit.

Currently,the nature of the discretion under the new Constitution states that the DPP may not discontinue a matter without the permission of the court.[167] The Constitution goes on to further

[167] Article 158(8) Constitution of Kenya 2010.

state that in exercising his powers, the DPP 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.[168]

Even though the Constitution presents a radical change and a much-needed improvement in the office of DPP, there is a need for adequate procedural law. This is because, without procedural law to narrow down the scope of discretion, the phrase "*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*" can be a hollow platitude. Where does the *"buck"* stop when defining public interest? What are the boundaries and limits? A properly drafted procedural law setting out the various circumstances in which the DPP shall invoke *nolle prosequi* is essential to prevent its abuse and more so to serve as an external bulwark against abuse.

We have seen in previous Chapters the procedure that is currently followed in the application for *nolle prosequi*. This study now proposes an important procedural reform to apply at all times where an application for the entry of a *nolle prosequi* is involved. Essentially, the ODPP should be required to furnish the trial court and all parties concerned with the reasons for their application to terminate the trial vide a *nolle prosequi*. These reasons should be served on the accused and the complainant at least seven days before the application for *nolle prosequi* is considered. The accused shall, in this instance, have an automatic right of reply to the prosecution's application.

The complainant will also have the right to put in a reply either in support of or in opposition to the prosecution's request. In this sense, the complainant may also move the court to take up the

[168] Ibid Article 158(11).

matter and procure leave to continue the proceeding in the form of private prosecutions if the State is unwilling or unable to do so.

#### 4.5.2.3. Extending the right of nolle prosequi to the Accused

It is recommended that the right to apply for a *Nolle Prosequi* should be extended to the accused. The rationale for this proposal is that the DPP is mandated with the power to prosecute on behalf of the people of the Republic of Kenya. This is deemed to logically follow a sound investigation that is presumed to have established justifiable culpability on the accused person(s).

Since the Constitution of Kenya provides certain guarantees for an accused person, for instance, that an accused is innocent until he is proven guilty,[169] it should then follow that if an accused person believes that they have certain justifiable and compelling reasons that would warrant the termination of the case against them, they should be accorded the right to make an application before the trial court putting forward such reasons they may have for the entry of a *nolle prosequi*. Such an application should, however, not be made after the accused person(s) have been put on their defence.

The trial court shall evaluate the reasons put forward by the accused against a minimum threshold (to be discussed *infra*) and make its ruling on the application. If the court finds that the application has no merit, the application shall accordingly be dismissed, and the matter proceed accordingly.

If, however, the court finds merit in the application by the accused, the court shall order that a *nolle prosequi* be deemed as having been entered in favour of the accused, and the trial shall terminate forthwith. Further, such termination shall be deemed to be an acquittal.

[169] Article 50 of the Constitution of Kenya, 2010.

#### 4.5.2.4. Right of Appeal

Any of the parties to criminal prosecution and who may, at the stage of the ruling by a trial court, on an application for a *nolle prosequi*, be dissatisfied with such a ruling should have an automatic right of appeal to the immediate superior court. In the case of the trial court being a subordinate court, the right of appeal would lie to the High Court and subsequently to the Court of Appeal. In the case of the trial court being the High Court of Kenya, then a right of appeal would lie to the Court of Appeal as of right.

It is vital that the Courts do recognize that they have a critical role to play with regards to the entry of *nolle prosequi* and in any appeals that may arise thereof.

#### 4.5.2.5. Limitation of Time

Where the entry of *nolle prosequi* is not a bar to subsequent proceedings against the accused person on account of the same facts, the accused person is put in a state of uncertainty as to whether and when the DPP may revive the criminal prosecutions against him. This is what Justice Harlan of the Supreme Court of United States in the case of *Klopferv North Carolina*[170] calls "a cloud of unliquidated criminal charges for an indeterminate period." The same concern was raised by the High Court in *George Gitau v Attorney General*.[171] While appreciating the effect of *nolle Prosequi*, the Court (Nyamu, Dulu, and Kubo J) observed that the very prospect of fresh charges being sprung up is agonising, prejudicial, and is a nightmare to the accused person.

It is against this backdrop that it is proposed that there be put in place a time limit within which fresh charges may be brought against the accused person after the presentment of the writ of *nolle*

[170] 386 U.S 213 (1967).
[171] HCC Rev. No.68 of 2003 (2008) eKLR.

*prosequi*. The lapse of the time limit given disentitles the prosecution the right to bring fresh charges against the accused person and thereby acquit the accused person. This study recommends that a one-year period be set as the ceiling. This would include an amendment of Section 82 of the CPC to the effect that subsequent proceedings shall not be commenced after one year on account of the same facts.

The one-year proposal is reasonable enough for both the prosecution and the accused person. The prosecution will have ample time to investigate and consider if there are new findings to warrant charging the accused person afresh. The accused shall also be certain of the period within which he/she may be charged. This period will also grant the accused ample time to adequately prepare his defence.

**4.5.2.6. Guidelines for the Minimum threshold of Justiciable and Compelling Reasons**

In the context of this study, the term minimum threshold connotes a benchmark against which any reason advanced by a party seeking a *nolle prosequi* before a trial court shall be evaluated to test its veracity and appropriateness. In this regard, reference is made to the principles set out in Article 158(11) in order to formulate practical ways in which the court can grant permission for the DPP to invoke this power.

Most significant, though, is the fact that this benchmark, though clearly stipulated, shall not act as a hindrance against the court from exercising its inherent jurisdiction to find any other reason as being justiciable and compelling for the approval of a *nolle prosequi* sought by any of the parties.

The proposed benchmark entails the following:

i. The reasons put forward by either party should not be against public interest or an attempt to stifle an obvious fundamental human right.

ii. In the case of reasons advanced by the prosecution, the court must weigh them against the likelihood of prejudicing the accused, whether the accused could suffer serious harm from the resultant discharge, and the public interest in the case.

iii. In the case of an application made by the prosecution after the accused has pleaded to the charge, no reasons relating to the public interest, state security, or incompleteness of investigations should be acceptable by the court.

iv. In the instance anticipated in (iii) above, acceptance of a *nolle prosequi* by the court shall, in any event, amount to an acquittal of the accused person(s).

v. No party shall be allowed to lead evidence to explain their reason, and the court shall proceed on the *prima facie* construction of the arguments advanced by the parties.

It is proposed that with a trial court having operational guidelines, it will be able to execute its judicial mandate of overseeing the course of justice with ease and effectiveness. Giving the court power over the whole process takes away the unfettered discretion from the prosecution and properly gives the trial court the ultimate say in the competing interests of the prosecution and the accused.

The trial court should maintain eternal vigilance against abuse of this power and must proceed with caution, especially when the accused person is unrepresented by an Advocate.

## 4.6. CONCLUSION

The entirety of this study has distinctly shown the misapplication of the power of *nolle prosequi*. It is evident that historically the realisation of justice for accused persons and the upholding of the fundamental rights of the accused person has been sacrificed at the altar of shoddy criminal prosecution, outrightderelictionofthe duty toprosecute, abuse of discretion, and political manipulation.

The proposals for reform set out in this Chapter are intended to minimise and eliminate these problems. The exercise of *nolle prosequi* should not compromise the fundamental human rights of the accused or subject them to unnecessary suffering and delays.

The Constitutional guarantees put in place for suspects should not be negated by the unchecked exercise of discretion and abuse of the same by the Prosecution. After all, the hallmark of criminal proceedings can only serve its purpose if it is adjudicated fairly on their merits.

When all actors uphold the tenets of the criminal justice system, the parties can expect the trial court to exercise the same impartiality in evaluating the reasons advanced for the entry of a *nolle prosequi* and to make informed but impartial decisions with the rights of the parties in mind.

It is reasonable to conclude that the reforms brought about by the Constitution of Kenya 2010 on the exercise of the power of *nolle prosequi* are radical and transformative. But as this study has shown, there is still a need for reform. There will always be instances when attempts may be made to circumvent the law and procure a *nolleprosequi* for ulterior purposes. The trial court must therefore strive to at all times conduct exerting scrutiny of the propriety of the proposed *nolle prosequi.* It is only by adopting a proactive attitude that our judicial system will harness the

fruits of the new constitutional dispensation as enriched by best practices in the international sphere for the benefit of upholding the fundamental rights and freedoms of the accused person.

In the final analysis, there remains a collective duty by all citizens to insist on a proper, accountable, and transparent application of discretion by the DPP. The decision to prosecute or terminate a prosecution must be guided only by wider public interest and the dictates of justice. And as has been said, *the price of liberty is eternal vigilance*.[172]We must therefore utilize all the tools at our disposal in continuously engaging and interrogating the exercise of the power of *nolle prosequi*.

## BIBLIOGRAPHY

### Books


1. Archbold, *Pleading, Evidence, and Practice in Criminal Cases* (London, Sweet & Maxwell, 1982).
2. Barron A., Collins H., Jackson E., Lacey N., Reiner R., et al., *Introduction to Jurisprudence and Legal Theory*: *Commentary and Materials* (Oxford University Press 2005).
3. Beccaria C., Voltaire, & Edward D., *An Essay on Crime and Punishment* (Second American edition. Philadelphia: Published by Philip H. Nicklin, no. 175, Chesnut St. 1819. A. Walker, printer, 24, Arch St.,1819).
4. *Black's Law Dictionary* (8th Edition, West Publishing Co., 2004).
5. Bwonwong'a M., *Procedures in Criminal Law in Kenya* (East Africa Educational Publishers, Nairobi 1994).


[172]There is some controversy as to whether it was Thomas Jefferson or Andrew Jackson or Wendell Philips who first uttered these words.

6. Christie G.C. & Martin P.H., *Jurisprudence: Texts and Readings on the Philosophy of Law* (2nd edition West Publishing Co.,1995).
7. De Smith & Brazier, *Constitutional and Administrative Law* (6thEdn, Sweet & Maxwell, Penguin Group, London 1990).
8. Devlin P., *The Criminal Prosecution in England,* (New Haven, Yale University Press, 1958).
9. Edwards J.L.J., *The Attorney General, Politics and the Public Interest* (Gaunt & Sons Inc. Florida, 1999).
10. Hart H.L.A., *The Concept of Law* (2nd Edition, London, Clarendon Press, 1997).
11. Hobbes T., *Leviathan,* Ch. XIII p. 88. Quoted from Wayne Morrison, *Jurispudence: From The Greeks To Post – Modernism* (Cambridge University Press, 1991).
12. Kiage P., *Essentials of Criminal Procedure in Kenya* (LawAfrica, 2010)
13. Lumumba P.L.O., *Criminal Procedure in Kenya,* (Michigan State University Press, Jun 2002).
14. Mitchel S., (ed), *Archibold, Pleadings, Evidence & Criminal in Criminal Cases,* (4thedn, Sweet & Maxwell London 1979).
15. Morrison W., *Jurisprudence: From The Greeks to Post-Modernism* (London, Cavendish Publishing Limited, 1997).
16. Murphy P., (ed) *Blackstone's Criminal Practice* (Blackstone Press Limited London 2001).
17. Phillips O.H. & Jackson, *Constitutional and Administrative law* (8th Edn, Sweet and Maxwell, London, 2001).
18. Rousseau J.J., *The Social Contract:Contrat social ouPrincipes du droit politique* (Translated by Henry A. Myers. (Paris: Garnier Frères 1800).

19. Simonds V., *Halsbury's Laws of England*, (3rdEdn Vol.10, Butterworth & Company, London 1995).

**Journal articles**

1. Adar K. G., 'The Internal and External Contexts of Human Rights Practice in Kenya: Daniel Arap Moi's Operational code,' (2000) 4(1) African Sociological Review.
2. Alec S., 'Non-Crown Prosecutions: Prosecution by Non-Police Agencies and by Private Individuals' (1986) Criminal Law Review.
3. Artz L. & Smythe D., 'Losing Ground? – Making Sense of Attrition in Rape Cases' (2007) 22 SA Crime Quarterly 15.
4. Campbell D., 'International Agency and Distribution Law' (2006) Center for International Legal Studies.
5. De Long E.H., 'Powers and Duties of the State Attorney-General in Criminal Prosecution' (1934) 25 Journal of Criminal Law and Criminology3.
6. Dickens B.M., 'Control of Prosecutions in the United Kingdom' (1973) 22 (1) The International and Comparative Law Quarterly.
7. Dotan Y., 'Should Prosecutorial Discretion Enjoy Special Treatment in Judicial Review? A Comparative Analysis of the law in England and Israel' (1997) Public Law Review 3.
8. Emery D.F., 'The Nolle Prosequi in Criminal Cases' (1913) 6 (4) Maine Law Review 1.
9. Engle E., 'Aristotle, Law and Justice: The Tragic Hero' (2008) Northern Kentucky Law Review 35.
10. Griffin L. K., 'Narrative, Truth, and Trial' (2013) 101 Georgetown Law Journal.
11. Jones E. 'The Office of the Attorney General' in Digest on Human Rights and Justice' (1969) Cambridge Law Journal.

12. Kangu M., 'Social Contract Conceptualization of the Theory and Institutional Governance' (2007) 1(2) Moi University Law Journal.
13. Keeton G.W., 'A Liberal Attorney-General: Being the Life of Lord Robson of Jesmon' (1949) London: Nisbet 125.
14. King L.J., 'The Attorney-General, Politics and the Judiciary' (2000) 29 Western Australian Law Review 156.
15. Kraska P.B., 'Criminal Justice Theory: Toward Legitimacy and an Infrastructure' (2006) 23(2) Justice Quarterly 2.
16. Krauss R., 'The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments' (2012) 6 Seton Hall Circuit Review 1.
17. Mac Carthy A., 'The Evolution of the Role of the AG' (2004) 11(4) Murdoch University Electonic Journal 1.
18. Materu S. F., 'The Post-Election Violence in Kenya: Domestic and International Legal Responses' (2014)Springer Verlag.
19. Mba O. 'Judicial Review of the Prosecutorial Powers of the Attorney-General in England and Wales and Nigeria: An Imperative of the Rule of Law' (2010) Oxford University Comparative Law Forum 2.
20. Mensah K.B., 'Discretion, Nolle Prosequi and the 1992 Ghanian Constitution' (2006) 50(1) Journal of African Law 50.
21. Musila G.M., 'The Office of the Attorney General in East Africa: Protecting Public Interest Through Independent Prosecution and Quality Legal Advice in Reinforcing Judicial and Legal Institutions: Kenya and Regional Perspectives' (2007)Konrad-Adenauer-Stiftung.
22. Posner R.A., 'The Meaning of Judicial Self-Restraint' (1983) 59(1) *Indiana Law Journal* 1.

23. RekoshE., 'Who Defines the Public Interest? Public Interest Law strategies in Central and Eastern Europe' (2005) Public Interest Law Initiative Papers 1.
24. Samuels A., 'Non-Crown Prosecutions: Prosecution by Non-Police Agencies and by Private Individuals' (1986) Criminal Law Review.
25. Vetten L., Jewkes R., Sigsworth R., Christofides N., Loots L., and Dunseith O., 'Tracking Justice: The Attrition of Rape Cases Through the Criminal Justice System in Gauteng.' (2008) Tshwaranang Legal Advocacy Centre, the South African Medical Research Council and the Centre for the Study of Violence and Reconciliation 49.
26. Vorenberg J., 'Narrowing the Discretion of Criminal Justice Officials' (1976) 4(1) Duke Law Journal 1.
27. Wolf L., 'Pre- and Post-Trial Equality in Criminal Justice in the Context of the Separation of Powers' (2011) 14(5) PER 59.

**Newspaper Articles**

1. Kadida J., 'Wako stops case against VP,' Daily Nation Wednesday, March 09, 2005.
2. Kanchory S., 'Don't Shoot the Messenger to Stem Fury on *nolle prosequi,' Daily Nation* Monday, 6thApril, 2005.
3. Kwamboka E., 'Ksh. 370 Anglo Leasing Case referred to Gicheru,' The Standard Online, availableathttp://www.standardmedia.co.ke/business/InsidePage.php?id=2000022725&cid=4& (Last accessed on 16th May 2021).
4. Mwaura P., 'Criminal Libel: why was the AG shy?' Saturday Nation, January 22, 2005.
5. The Nation Correspondent , Daily Nation, 'Wako denies being influenced over Delamere and Lucy Cases,' Monday May 23, 2005.

6. Warigi G., 'Justice does not live here anymore,' Sunday Nation, May 22, 2005.

**Internet Articles**

1. <http://definitions.uslegal.com/j/judicial-self-restraint/> (Accessed on 15th August 2021).
2. <http://usconservatives.about.com/od/glossaryterms/g/Judicial_Restraint.htm> (Accessed on 15th August 2021).
3. Anglo Leasing and Murgor stating he was never allowed to do his work available at <http://demokrasia-kenya.blogspot.com/2005/05/very-friendly-message-to-mr-murgor.html (Accessed on 25 August, 2021).
4. Attorney General's Office and Oliver Heald QC MP, 'Speech at English Law Students' Association address at Durham University' delivered on 24 October 2013 (Oct 2013), available at <https://www.gov.uk/government/speeches/english-law-students-association-address-at-durham-university> (Last accessed on 9 August 2021).
5. Corruption in Kenya, Is the Attorney General Letting KACC Down? available at http://corruptioninkenya.wordpress.com/2009/07/20/is-the-attorney-general-letting-kacc-down/ (Last accessed on 15th August 2021).
6. Erasmus H.J., 'Cost and Fee Allocation in Civil Procedure – Republic of South Africa' (2009), available at<http://www personal.umich.edu/~purzel/national_reports/South%20Africa.pdf>(Last accessed on 9 August 2021).
7. Federal Judicial Center, 'The U.S. Legal System: A Short Description' (2007) <http://www.fjc.gov/public/pdf.nsf/lookup/U.S._Legal_System_English07.pdf/$file/U.S._Legal_System_English07.pdf>(Last accessed on 10 August 2021).

8. Federal Judicial Center, 'The U.S. Legal System: A Short Description' (2007), available at <http://www.fjc.gov/public/pdf.nsf/lookup/U.S._Legal_System_English07.pdf/$file/U.S._Legal_System_English07.pdf>(Last accessed on 10 August 2021).
9. Holmes, Jr. O.W., 'Legal Theory, and Judicial Restraint' available at <http://ndpr.nd.edu/news/25262-oliver-wendell-holmes-jr-legal-theory-and-judicial-restraint/> (Accessed on 15th August 2021).
10. Katers N., 'Judicial Activism and Restraint: The role of the Supreme Court,' available at http://www.associatedcontent.com/article/21725/judicial_activism_and_restraint_the.html accessed 15 August, 2021.
11. Lenel B., 'The History of South African Law and its Roman-Dutch Roots' (2002), available at <http://www.lenel.ch/docs/history-of-sa-law-en.pdf> (Last accessed on 9 August 2021).
12. Luban D., 'Justice Holmes and the Metaphysics of Judicial Restraint,' at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3270&context=dlj (Accessed on 15th August 2021).
13. Mwalili J.J., 'The Role And Function Of Prosecution In Criminal Justice,' (107th International Training Course Participants' Papers, Resource Material Series No. 53) available at <http://www.unafei.or.jp/english/pdf/RS_No53/No53_23PA_Mwalili.pdf> (Accessed on 17th August 2021).
14. Nungo D., 'Nolle Prosequi Unjust,' AllAfrica.com, available at http://allafrica.com/stories/200503140908.html (Last accessed on 15th August 2021).
15. United States Department of Justice, 'Frequently Asked Questions' (US Department of Justice, 2015), available at<http://www.justice.gov/usao/justice-101/faq>(Last accessed on 10 August 2021).

**Reports**


1. Administrative Office of the U.S. Courts, *The Federal Court System in the United States – An Introduction for Judges and Judicial Administrators in Other Countries*, 3 edn (Administrative Office of the U.S. Courts, 2010) 8, available at <http://www.uscourts.gov/uscourts/FederalCourts/Publications/English.pdf, accessed on 10th August 2021).
2. Kenyan Code of Conduct & Ethics for Public Prosecutors (2013).
3. Mati M. &Githongo J., 'Judicial Decisions and the Fight against Corruption in Kenya' (2013) A Strategy for Reforming the Judiciary of Kenya, Transparency International-Kenya.
4. Ochieng V., 'Police and Judiciary Accountability in Kenya,' (2014) Independent Medico legal unit (IMLU) Kenya.