THE DPP'S SUPREMACY IN THE CRIMINAL JUSTICE OF TANZANIA: ANALYSIS OF THE EXERCISE OF *NOLLE PROSEQUI*

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Abstract

The judiciary is the final and last authority in the dispensation of justice. Being the final authority in the dispensation of justice, the judiciary should have a say in every aspect relating to administration of justice. Oddly, *nolle prosequi,* a power given to the Director of Public Prosecutions (DPP) appears to oust the supremacy of the judiciary in dispensation of justice. This power makes the DPP supreme over and above the judiciary. This article aims at analyzing the power of the DPP to enter *nolle prosequi* and its legal implications in the administration of criminal justice of Tanzania. Fundamentally, the article reveals that, *nolle prosequi* is uncontrolled and hence, the power is prone to abuse. It is recommended that there is a need to entrench limitations through legislative frameworks including restrictions on reinstitution of criminal cases against the accused person based on the same facts after *nolle prosequi* has been entered.

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Key words: *Criminal Justice, Director of Public Prosecutions, Nolle Prosequi, Tanzania*

1. INTRODUCTION

Administration of justice is one of the functions of State Organs vested upon the judiciary under the separation of powers doctrine.[1] The Constitution states that the judiciary is the final authority in dispensation of justice.[2] It means that whenever matters of administration of justice require determination it is the courts of law which are vested with powers to be so determined. It is the final arbiter. In Tanzania, there are other institutions which have a role to play in the administration of criminal justice by initiating, investigating or prosecuting criminal cases. The DPP, which plays a pivotal role in the administration of criminal justice, is among these institutions. The significance of the DPP for purposes of this analysis revolves around the mandate vested in this office in controlling and supervising all criminal cases and powers in discharging related responsibilities.

This article examines the extent to which the exercise of power to enter *nolle prosequi* by the office of DPP makes it supreme over and above the court in Mainland Tanzania.

The courts of law are the ones empowered constitutionally to determine criminal cases while *nolle prosequi* is a remedy available to the DPP to terminate proceedings at any stage before a decision is pronounced.

2. THE OVERVIEW ON THE ROLE OF THE COURT

The nature of human societies demand that there should be a body or authority which is impartial and independent in nature and well-groomed in

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1 See Arts. 4(1) and (2), 107A and 107B of the Constitution of the United Republic of Tanzania, Cap 2 [R.E. 2002].

2 *Ibid*., Art. 107 A (1).

the law, charged with the duty of settling disputes amongst the people or in the sphere of public life.[3] That body, which is vested with the mandate of settling disputes is the Court. The Court is an independent organ that exists to interpret laws, to resolve disputes, try suspects brought before it and mete out punishment where punishment is due, uphold rule of law[4] and protect fundamental rights of the people as guaranteed by the state's laws and Constitution.[5] In Tanzanian, the Court is an organ of the State which is mandated with the role of administration and dispensation of justice.[6] Administration of justice by the Court entails both civil and criminal justice. *Nolle prosequi* being one of the aspects within the criminal justice system of a State must be exercised diligently. It is a settled legal requirement that when administering justice the Court should not be tied up with technical provisions which may obstruct dispensation of justice.[7] While resolving disputes, Courts are bound to uphold, protect and guarantee fundamental human rights.[8] The Court can achieve this important duty of protecting the fundamental human rights through proper interpretation and application of the law.

3. EXERCISING *NOLLE PROSEQUI* IN TANZANIA

Prosecution and termination of criminal proceedings in Tanzania is the sole discretionary mandate of the DPP.[9] *Nolle prosequi* is a formal entry on the

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3 Shehu, A. T., "Judicial Review and Judicial Supremacy: A Paradigm of Constitutionalism in Nigeria". *11 (1) ICLR*, 2011 at pp. 61-62.

4 Msekwa, P., *The Report of the Judicial System Review Commission*, Dar es Salaam, Tanzania, 1977, at p. 95.

5 Etose, G. O., (*et al),* "An Appraisal of the Application of the Doctrine of *Nolle Prosequi* in Nigeria"*,* 8 (1) *Cranbrook Law Review,* 2018, at p. 19.

6 Arts. 4(2) and 107A of the Constitution of the United Republic of Tanzania, Cap. 2 [R.E. 2002].

7 *Ibid*, Art. 107A (2)(e).

8 Ssekaana, M., *Public Law in East Africa,* Kampala: Law Africa, 2013, at p. 19.

9 *DPP v. Samweli Mnyore @ Mamba & Another,* Criminal Session No. 63 of 2006, High Court of Tanzania at Mwanza (Unreported) at p. 6.

Court's record by the DPP declaring that he will not prosecute a case further.[10]*Nolle prosequi* is exercised at the discretion of the DPP.[11] In deciding whether to continue or to discontinue a case, the DPP is supposed to balance between the need to do justice, the need to prevent abuse of legal process and public interest.[12] In exercising *nolle prosequi* the DPP should maintain certainty, consistency, uniformity, absence of arbitrariness, the need for flexibility, sensitivity and adaptability.[13] The DPP is required to use *nolle prosequi* sparingly for the sake of controlling proceedings and upholding justice. *Nolle prosequi* should not be used as a means of causing hardship or oppression to the accused person.

In Tanzania, the mandate to enter *nolle prosequi* is a legal right vested to the DPP who is the head of criminal prosecutions in the country. It is a discretionary power of the DPP.[14] The Criminal Procedure Act,[15] the National Prosecutions Services Act,[16] the Magistrates Courts Act[17] and the Economic and Organised Crime Control Act[18] empower the DPP to enter *nolle prosequi* in criminal proceedings. The law empowers the DPP to enter *nolle prosequi* at any stage before the judgment is delivered by the Court even if it is a date set by the court to deliver its judgment.[19]

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10 Above note 5 at p. 2.

11 Krauss. R., "The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments", 6 (1) *Seton Hall Circuit Review,* ,2009, at p. 10.

12 S. 8 of the National Prosecution Services Act, 2008; and art. 59B (4) of the Constitution of the United Republic of Tanzania, 1977.

13 Teslik. R., *Prosecutorial Discretion: The Decision to Charge an Annotated Bibliography*, Washington D.C, National Criminal Justice Service, 1975 at p. 5.

14 Above note 9.

15 S. 91, Cap. 20 [R.E 2019].

16 S. 9 (1) (d), Cap. 430 [R.E 2019].

17 S.33 , Cap. 11 [R.E 2019] read together with S. 3 (2) (C) , Cap. 20 [R.E 2019].

18 S. 29 (6) Cap. 200 [R.E 2002].

19 Above note 9 at p. 3.

4. MODES OF ENTERING *NOLLE PROSEQUI*

It should be understood that the DPP is not compelled to make a formal (written) application to enter *nolle prosequi* to the Court. The DPP enters *nolle prosequi* by stating in Court on behalf of the Republic that the proceedings concerned should not be continued. Firstly, the DPP may inform the Court concerned, in person, that he does not wish to continue prosecuting the case.[20] Secondly, the DPP may enter *nolle prosequi* by informing the Court concerned in writing on behalf of the Republic that the proceedings should not continue.[21] In the second mode, the DPP is just required to sign a Notice stating that the Republic does not wish the prosecution to continue.[22] In this mode it is not mandatory for the Director of Public Prosecutions to be present in court when entering *nolle prosequi*. That means the written Notice, signed by him and filed to the Court is sufficient for the DPP to stop the proceedings. Simply stated, there are no any formal requirements procedurally to compel the DPP to signify his intention to terminate proceedings by availing sufficient notice to both the Court and the accused person. Lack of clear guideline on actual implementation of the *nolle prosequi* and absence of the need to state reasons for not preferring continuance of the proceedings make the exercise of *nolle prosequi* a one sided matter empowering the DPP to decide at his sole discretion.

5. FACTORS INFLUENCING ENTERING *NOLLE PROSEQUI*

There are various factors which may influence the discontinuation of a case by the DPP. The reasons are divergent which range from Court congestion, cases found to be instituted on malicious grounds or unfounded cause, lack of evidence, organisational strains, political pressure, as well as community

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20 *Ibid.*
21 S. 91 (1) Cap. 20 [R.E 2019].
22 *Ibid.*

pressure.[23] Other factors include on account of the complainant expressing a desire not to prosecute the offender, the costs of prosecution being too excessive depending on the nature of the offence, possibilities of the harm committed by the offender to be corrected without prosecution and likelihood of the offender to aid achieving other enforcement goals if not prosecuted. Others include the prosecution of accused persons being against public interest, imminent possibility that prosecution may disrupt diplomatic relationship, where the mere fact of prosecution would in the prosecutors judgment cause undue harm to the offender and disappearance of crucial witnesses by reasons of death or other cause.[24]Failure of the law to require the DPP to assign reasons for entering *nolle prosequi* renders the whole process devoid of reasons as none in the criminal justice system apart from the DPP would be aware of the reasons for terminating the proceedings through *nolle prosequi* and reinstitution of the same. Indeed, neither the Court, accused person, victim or the advocates defending the accused person may have opportunity to know such reasons as the law does not require the DPP to offer any reason.

6. THE IMPACT OF *NOLLE PROSEQUI* IN CRIMINAL JUSTICE IN TANZANIA

The exercise of *Nolle prosequi* has impacts in the administration of justice. It has impacts on the court, accused person, victim of a crime and the prosecutor.

6.1 Nolle *Prosequi* as a Tool of Case Loosing Escape

Nolle prosequi has been used to enable the prosecutor to avoid losing the case. This is due to the reason that if the prosecutor has prosecuted a case and is of the opinion that he may end up losing the case even if it is a day before

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[23] Teslik, R., *Prosecutorial Discretion: The Decision to Charge an Annotated Bibliography*, Washington D.C.: National Criminal Justice Service, 1975 at p. 11.

[24] *Ibid.*, at p. 20.

judgment is delivered by the Court, the DPP may simply enter *nolle prosequi*. After having entered *nolle prosequi* the DPP may learn areas of weaknesses and improve them and can reinstate the case to the same Court. In so doing, *nolle prosequi* is used as an instrument of avoiding bad results on the part of the DPP. Allowing prosecutors to stop prosecutions at any stage before judgment and permitting re-arrest and re-charging the accused persons on account of the same facts will afford the DPP an opportunity to take unfair advantage of the power to enter *nolle prosequi* to the detriment of the accused persons. The accused would be deprived of the protection and rights of equality before the law afforded to them by the Constitution of the United Republic of Tanzania.[25]

Absence of limitations on time of entering *nolle prosequi* is likely to jeopardise rights of the accused person by derailing the determination of the matter as re-arrest and re-institution of proceedings based on the same fact means that evidence must be adduced afresh. This is despite the Court and accused person having used human and financial resources throughout the hearing process when *nolle prosequi* is entered upon conclusion of the evidence of both sides but immediately before pronouncement of the judgment.

6.2 *Nolle Prosequi* as an Instrument for Forum Shopping

The DPP may enter *nolle prosequi* in order to get a good result. The DPP may enter *nolle prosequi* in a case instituted in one Court and re-institute it in a different Court where he is likely to get a favourable result.[26] An illustration for this is the case of *DPP v.Mehboob Akber Hajji and Norman Francis Tosae.*[27]In this case the accused persons applied for bail at the trial Court. When the

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25 Above note 9 at p. 3.

26 Peter, C.M., Amicus Curiae Brief in the case of *Attorney General v. Jeremiah Mtobesya,* Civil Appeal No. 65 of 2016 Court of Appeal of Tanzania at Dar es Salaam, at p. 6.

27 Criminal Appeal No. 28 of 1992, Court of Appeal of Tanzania at Dar es Salaam (Unreported).

Court was about to deliver its ruling the DPP filed a certificate barring the Court from admitting the applicants to bail.[28] The applicants objected to the certificate filed by the DPP. The Court upheld the objection and granted bail. Being aggrieved with the decision of admitting the accused on bail, the DPP decided to terminate the proceedings by entering *nolle prosequi*. The Court discharged the accused persons.[29] Immediately after their discharge they were re-arrested and arraigned before another court, the Ilala Resident Magistrates Court. In this situation, the DPP applied the forum shopping technique with the hope of getting a better outcome for the Republic.

However, forum shopping should not be encouraged as it is against the interest of justice. Peter argues that forum shopping should not be encouraged in the judiciary including the High Court or the Court of Appeal of Tanzania.[30] Exercising forum shopping to the higher judiciary is crossing the red light and it is against the integrity of the judicial system. Something should be done to preserve the integrity of the judicial system in the country as the final authority in administration of justice in the country.[31] The High Court of the United Republic of Tanzania and the Court of Appeal of Tanzania being courts of records must be treated with courtesy and respect they deserve.

6.3 *Nolle Prosequi* as a Catalyst for Negligence by the Prosecution

Application of *nolle prosequi* encourages negligence on the part of prosecutors. This is due to the fact that a prosecutor institutes cases in Court unprepared or without having evidence to justify the charge. The prosecutor who uses this approach sometimes knows that even if they may fail to prove the case he can enter *nolle prosequi* and start afresh. This can be illustrated by the case

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28 Mirindo, F., *Administration of Justice in Mainland Tanzania,* Dar es Salaam: Law Africa, 2011, at p. 184.

29 *Ibid.*

30 Above note 26 at p. 6.

31 *Ibid.*

of *Republic v Chacha Mwita Matinde @ Samwel Masoya Mato @ Bakari @ Mtoto wa Yesu & 2 Others.*[32] The facts of the case were as follows: On 27th October 2017 the case was scheduled for hearing and the prosecution had five witnesses in Court but the State Attorneys prayed for adjournment of the case on the ground that they need time to trace the records of the Resident Magistrates Court. But the record revealed that on 1st May 2017 when the matter was called for hearing the prosecutor asked for adjournment of the case on the same ground. The prayer for adjournment by the prosecutor was granted by the Court and the case was scheduled to proceed on 30th October 2017. However, on the 30th day of October 2017 when the hearing was about to start, the State Attorney informed the Court that the DPP wished not to prosecute the accused any further.

The prosecutor entered *nolle prosequi* under section 91(1) of the Criminal Procedure Act.[33] The Court granted it on the basis that the DPP has to exercise his powers of re-arresting and re-charging the accused persons within the Court session between 16th October and 13th November 2017.[34] The lesson from this decision is that the Court is not happy with the tendency of the DPP of entering *nolle prosequi* and re-arresting and re-charging the accused persons on the same grounds. That is why the Court decided to limit the time frame within which the DPP can re-arrest and re-charge the accused person on account of similar facts.

Indeed this approach by the Court is commendable and progressive in nature. It ensures certainty in the administration of criminal justice as the right of an accused person to know the fate of his case is ensured. It limits unnecessary prolongation of criminal cases.

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32 High Court of Tanzania at Dar es Salaam, Criminal Sessions Case No. 15 of 2013. (Unreported).

33 *Ibid* at p 2.

34 *Id.,* at p 5.

6.4 Denial of Justice to the Victim of a Crime

The DPP's power of *nolle prosequi* denies the victim an opportunity to get a final result of the case. This is due to the fact that *nolle prosequi* is entered before the verdict is delivered by the Court. Moreover, the procedure for entering *nolle prosequi* does not require the DPP to consult the victim of the offence before stopping prosecutions.[35] It has to be understood that in the conduct of criminal proceedings, although the DPP appears as a party to the case along with the accused person, in reality the DPP is an advocate of the victim, defending the rights and interests of the victim. As an advocate he ought to have been required by the law to consult the victim of the case before he stops prosecutions of a case so as to satisfy and make his client aware of the motion. Stopping prosecuting a case without consulting the victim is to deny the victim's right to information which is guaranteed by the Constitution.[36]

Moreover*, nolle prosequi* bars the victim of the offence from bringing his case afresh.[37] The conduct of criminal prosecution is within the mandate of the DPP on behalf of the wronged party. Where the DPP terminates the case through *nolle prosequi* the victim of the case would have no remedy.[38] The victim's right to pursue justice is brought to an end. The victim's justice can only be resurrected when the DPP decides to continue the case.

6.5 Discharge of the Accused Person versus Acquittal

The impact of *nolle prosequi* is to discharge the accused person.[39] Where the accused person is discharged and the DPP is not willing to re-institute the case afresh, the accused person will enjoy his liberty and live as a free person.

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35 Peter, C. M, *Human Rights in Tanzania*; *Selected Cases and Materials,* Koln – Germany: Rudiger Koppe Verlag, 1997, at p. 742.

36 Art. 18 of the Constitution of the United Republic of Tanzania, 1977.

37 *Nchambi Kija v. Francis Msalika and Another* [2002] T.L.R.at pp. 38-9.

38 *Id.*

39 S. 91(1) of the Criminal Procedure Act, Cap. 20 [R.E 2019].

The DPP may enter *nolle prosequi* and may not be willing to re-institute it where he is convinced that the case was initially instituted on malicious ground, or where there is no evidence to prove the case or where justice demands *nolle prosequi* to be entered.[40] More often than not the DPP re-institutes charges against the accused persons who were discharged upon entering *nolle prosequi*.[41] Such tendencies of reinstituting the case based on the same facts is what makes the exercise of the DPP's powers to enter *nolle prosequi* be questioned.

The operation of *nolle prosequi* does not prevent an accused person from being re-arrested and being brought to Court in the future on account of the same offence.[42] This is due to the fact that termination by *nolle prosequi* does not amount to acquittal but merely discharges the accused person. A person who is discharged under *nolle prosequi* may be brought to the Court on account of the same facts. Once the charge is re-instituted by the DPP, the case will start afresh as a new case with a different case number.[43] The law allows the DPP to enter *nolle prosequi* in respect of the same proceeding as many times as he wishes.[44] Unrestricted exercise of this right to prosecute on the same facts after entering n*olle prosequi* contravenes public policy and right of access to justice as it leads to endless prosecution. It is the interest of justice and public policy that there must be an end to litigation. This is true particularly when *nolle prosequi* is entered immediately before judgment is delivered or upon completion of hearing of evidence from both sides. It is really disheartening to witness incarceration of an accused person whose case is terminated by *nolle prosequi* and then charged afresh on the same facts. Such actions prolong incarceration of accused persons and require reform of the legislative

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40 *Berger v. United States* 295 US 78 (1935).

41 Above note 9 at p. 3.

42 *Shadrack Balinago v Fikiri Mohamed @ Hamza, Tanzania National Roads Agency (TANROADS) and the Attorney General,* Civil Appeal No. 223 of 2017, Court of Appeal of Tanzania at Mwanza (Unreported) at p. 8.

43 Above note 9 at p. 3.

44 Above note 5 at p. 2.

framework prescribing limitations on re-arrest and prosecution upon entering *nolle prosequi*.

6.6 Harassment and Torture of the Accused Person

In some jurisdictions, *nolle prosequi* has been used to harass and torture the accused.[45] The accused person suffers more harm when a proceeding is dismissed and re-instituted. Under *nolle prosequi* the accused person is exposed to re-arrest, prolonging his case and may require repayment of bond and seeking other sureties for bail considerations.[46] It jeopardizes the accused person's right to counsel of his choice as he may be required to pay fees for engaging another advocate. It erodes the accused person's confidence against the Court's ability to conduct fair trials which is contrary to the principles of administration of justice and also may influence the accused person to lose trust over private practitioners because he may fail to know why the advocate is not defending him probably. He may think that his advocate is incompetent.[47]

Nolle prosequi is a uniquely coercive power. Through this power the DPP could drag the accused person to and from Court without any foreseeable end.[48] However, it ought to have been known by the legislators that, once the prosecutor files a criminal charge in Court, the Court ought to have full control. After filing of a charge the accused person's constitutional rights such as equality before the law, fair trial, natural justice and presumption of innocence becomes operational.[49] One of the requirements of the due process is to balance between the two contending powers: that is the accused

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45 Thorp, J.A., "Nolle –and- Reinstitution: Opening the Door to Regulation of Charging Powers", 71 (429) *NYU Annual Survey of America Law,* 2016 at p 430.

46 *Ibid.*

47 *DPP v. Alune Gidion Kasililika and Others* Criminal Case No 54 of 2014, In the Resident Magistrate Court of Dar es Salaam at Kisutu (Unreported).

48 Above note 43 at p. 10.

49 Mvungi, S., "The Right to Disobey Unjust Law", 1 *Nyerere Law Journal*, 2003 at p. 26; see also above note 46 at p. 10.

and the accuser.[50] This balance is fundamental in the adversarial system as it guarantees equality. The adversarial system operates and guarantees fairness and neutrality of the decision maker. The judge is there to ensure that the 'fight' is fair with no fouls.[51] Unless and until the legislature improves the law, the DPP may continue to gain unfair advantage which compromises the integrity of the right of access to justice.[52] It is not good practice for the DPP to withdraw charges and reinstate them within the same breath.[53]

Under the circumstances prevailing in Tanzanian legal regime, the exercise of the powers to reinstitute the same charges upon entering *nolle prosequi* do not afford an opportunity to the accused person to enjoy his rights and freedoms. Such actions impair the rights of the accused person to fair trial and equality before the law.

6.7 *Nolle Prosequi* as a Pre-emption of the Court in Administering Justice

Once the DPP terminates proceedings he is depriving the Court an opportunity to determine the matter hence no precedent will be created in that particular case. In the case of *SMZ v. Machano Khamisi & 11 Others,*[54] the DPP entered *nolle prosequi* in order to terminate the proceedings in this case. However, the Court of Appeal of Tanzania recognizing the importance of the matter decided to invoke its revisionary powers as a result it proceeded with the case. Without this case Tanzania would have no precedent on whether or not the offence of treason may be committed against the

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50 Above note 43 at p. 10.

51 *Ibid.*

52 *Ibid.*

53 *Kaitale Julius and 3 Others v. Uganda,* the Constitutional Court of Uganda at Kampala, Constitutional Reference No. 11 of 2014, at p 10.

54 Court of Appeal of Tanzania at Zanzibar, Criminal Application No. 8 of 2000 (Unreported).

Revolutionary Government of Zanzibar.[55] Considering the above position, it is commendable that, if at all the DPP is in need of terminating a proceeding, he should terminate a proceeding sparingly and in good faith. The DPP should not use *nolle prosequi* as a remedy to improve evidence.

Nolle prosequi might be applied beneficially to the administration of criminal justice where a frivolous case is terminated without an intention to re-institute it. Indeed, application of *nolle prosequi* in such circumstances will save the Court's time, resources and backlog of cases in the Court. Also, *nolle prosequi* can reduce the number of inmates in the prison and in doing so lead to decongestion of prisons. The use of *nolle prosequi* in order to reduce inmates in prisons makes the DPP a filter of all cases which were instituted without sufficient evidence to prove the criminal charges. Indeed, exercise of the *nolle prosequi* by the DPP intending to terminate all unfounded criminal cases against accused persons either in remand prisons or on bail reflect proper exercise of constitutional and statutory mandates entrusted on the DPP to oversee, control prosecution processes in the country and coordination of all investigation and prosecution.

Application of *nolle prosequi* has a negative impact on the Court. It makes the accused person assume that the DPP is over and above the Court. This is due to the fact that the DPP enters *nolle prosequi* even without providing any justifiable and plausible reasons for his decision. The accused person and the Court are denied the chance to know why the prosecution has stopped. The normal Court practice is that anything which is to be done to the Court, the Court must be informed of the reason why it has been done the way it is done. After being satisfied with the reason given the Court is mandated to provide its decision. This Court practice can be distinguished with the DPP's practice where he enters *nolle prosequi*. Where the DPP enters *nolle prosequi* the

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55 SMZ v. *Machano Khamis & 11 Others*, Court of Appeal of Tanzania at Zanzibar, Criminal Application No. 8 of 2000 (Unreported).

traditional practice of giving reason is waived and the Court cannot question him. This practice therefore marginalizes the Court's position in the mind of the people. It is on this ground that stakeholders in the criminal justice system including practicing advocates, academicians and judicial officers consider exercise of powers of the DPP to enter *nolle prosequi* and re-institute the criminal charges afresh as wild and uncontrolled powers which impair access to justice.

6.8 *Absence* of Reasons for *Nolle Prosequi*: A Vitiating Factor for Access to Justice

Administration of justice calls for fairness of the processes throughout. The accused person, Court and victims are generally entitled to know the reasons for both terminations of proceedings through entering *nolle prosequi* as well as re-institution of the same based on the same facts. Absence of obligation to assign reasons for the DPP's action to terminate proceedings through *nolle prosequi* is violation of fairness and accountability.

As such, this power of the DPP to enter *nolle prosequi* without giving reasons is complete and ultimate, thus completely eroding the principles of fairness, and accountability in the use of public power. These principles are essential for good governance and thus must be accepted, developed and promoted.

Although there is no requirement to give reasons on the part of the DPP when exercising the right to enter *nolle prosequi*, yet in Tanzania the requirement of giving reasons for any administrative decision is a fundamental principle. In the case of *Tanzania Air Service Limited v. The Minister for Labour, Attorney General and the Commissioner for Labour*[56] Samatta JK (as he then was) stated that;

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[56] (1996) T. L. R. 217at p. 224.

> … a duty to give reasons should be recognized by our law and treated as being of decisive importance in administrative justice. Failure or refusal to give reasons by the decision-maker renders the decision a nullity.[57]

In other commonwealth jurisdictions such as Australia, Western Australia and Queensland and Ontario - Canada, the DPP and the Crown Attorney, respectively, are under duty to give reasons when they enter the *nolle prosequi* plea.[58] Similarly, the Crown Prosecution Service (CPS) in England and Wales must provide reasons to victims of the crime if it decides not to proceed with a prosecution.[59]

Wade emphasises that giving reasons is one of the pivotal pillars of justice when he states that:

> Unless the citizen can discover the reasoning behind the decision, he may not be able to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. A right to reasons is therefore an indispensable part of a sound system of administrative justice. Natural justice may provide the rubric for it, since the giving of the reasons is required by the ordinary man's sense of justice. It is a healthy discipline for all who exercise power over others. Reasoned decisions are only vital for the purposes of showing the citizen that he is receiving justice; they are also valuable discipline for the

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57 *Ibid.*

58 Mensah, K. B, "Discretion, Nolle prosequi, and the 1992 Ghanaian Constitution". 50 (1) *Journal of African Law,* 2006 at pp.47-58.

59 *Ibid.*

> tribunal itself (decision-maker). For decisions generally a statement of reasons is one of the essentials of justice.[60]

It is in an opportune time for Tanzania legal framework on *nolle prosequi* to emulate this requirement of administrative justice to give reasons for a decision. Such inclusion makes the criminal justice system more certain and ensures that justice is seen to have been done. The DPP should account for reasons for entering *nolle prosequi* especially when such action is done after incarceration of the accused person for a long time.

7. THE MANDATES OF THE COURT OVER *NOLLE PROSEQUI*

In Tanzania, the right to terminate criminal proceedings is a statutory right vested in the DPP.[61] The laws permit the DPP to terminate proceedings at any stage before judgment or verdict is entered.[62] The DPP has absolute discretion to continue or discontinue any prosecution irrespective of the stage it has reached even if it is a few seconds before the judge or magistrate commences reading out the judgment of the case.[63] The DPP may do so for the purpose of aborting the entire proceedings so that he may start afresh or for the sole purpose of discontinuing a prosecution. In doing so the DPP is not obliged to give any reason. He may merely stand up and inform the Court that he does not wish to continue prosecuting the case or he merely has to sign a piece of paper saying the Republic does not wish the prosecution to continue.[64]

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60 Wade, H.W.R, *Administrative Law* (5th Edn), Oxford, Clarendon Press, 1982, at p. 548 .

61 S. 9 (1) (d) of the National Prosecutions Services Act, Cap 430 [R.E 2019]; and ss. 91 and 98 of the Criminal Procedure Act, Cap 20 [RE 2019].

62 Ss. 91 and 98 of the Criminal Procedure Act, Cap 20 [RE 2019].

63 Above note .9 at p. 3.

64 *Ibid.*

As noted, the DPP enters *nolle prosequi* merely by sending a notice telling the court that the matter should stop. This procedure of sending a notice to Court deprives the Court and the accused person of the opportunity to ask the DPP anything with regard to his *nolle prosequi* which has been entered. The law in Tanzania does not impose a condition to require the DPP or his delegate to be present in Court when entering *nolle prosequi* so as to furnish the Court and the accused person the right to seek and get clarification from the DPP when the need arises.

As the law stands, the DPP is a master of himself and there is no control whatsoever over his power of discontinuing criminal proceedings through entering *nolle prosequi* and re-institution of the same charges. His power to discontinue criminal proceedings can be extended to cases instituted by other persons or authority as the case may be.[65] For instance, in *Republic v. Alune Gidion Kasililika and 11 Others,*[66] the Court was of the view that section 91(1) of the Criminal Procedure Act gives discretion to the DPP to withdraw cases which are in Court at any stage before verdict or judgment is given. The law requires the Court to discharge the accused person in respect of the charge from which such *nolle prosequi* is entered. The Court cannot reject the DPP's prayers of entering *nolle prosequi*, provided that it is entered as per the requirement of the law. *Nolle prosequi* by the DPP is a statutory and a constitutional right. *Nolle prosequi* enables the DPP to control all aspects of criminal prosecutions and proceedings.[67] However, it is a firm view of this undertaking that such action by the DPP of controlling all aspects of criminal prosecution should in no manner affect the interests and rights of other

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65 Above note 5 at p. 2.

66 *Director of Public Prosecutions v Alune Gidion Kasililika& 11 Others*, Criminal Appeal No. 13 of 2017, High Court of Tanzania at Dar es Salaam (Unreported), at p. 8 which was originated in Criminal Case No 54 of 2014, In the Resident Magistrate Court of Dar es Salaam at Kisutu.

67 *DPP v. Iddi Ramadhani Feruz,* Criminal Appeal No. 154 of 2011, Court of Appeal of Tanzania at Zanzibar (Unreported).

important stakeholders in the administration of criminal justice namely, the accused persons and the Court.

It has been observed that Courts have no power to control the DPP's exercise of *nolle prosequi*. The law has made the DPP uncontrollable by the Court.[68]*Nolle prosequi* has been used to water-down the '60 days rule' in the sense that, where the DPP forms an opinion that the case is about to be dismissed by the Court for contravening section 225 of the Criminal Procedure Act, the DPP may decide to terminate the proceeding and start afresh. Termination is used to prevent the ends of justice especially where the DPP is of the opinion that he is about to lose the case. In order to avoid obtaining a judgment against the Republic, the DPP may decide to terminate it, rectify the defects and start afresh. This has been influenced by the fact that he enjoys enormous powers without checks in relation to exercise of the right to enter *nolle prosequi*.

However, there are constitutional principles imposed on the DPP's exercise of power. In the exercise of power to terminate proceedings, the DPP is supposed to respect the need for dispensing justice, prevention of misuse of procedures for dispensing justice and public interests.[69] So whenever the DPP terminates a proceeding, his termination must be tested against these constitutional standards. It is submitted that these constitutional considerations were introduced for the purpose of giving the prosecutor latitude and freedom to enforce the law without fear, favour or ill will.

The constitutional provisions seem to provide guidance to the DPP on the exercise of his powers fairly. Constitutionally, the DPP is not required to re-institute the same proceedings unlimitedly after entering *nolle prosequi* as that would amount to abuse of procedures for dispensing justice.

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68 *Nchambi Kija v. Francis Msalika and Another* [2002] T.L.R at pp. 38-39.

69 Art. 59B 4(a-c) of the Constitution of the United Republic of Tanzania, 1977. See also s. 8 of the National Prosecution Services Act, Cap. 430 [R.E 2019].

Since section 91 of the Criminal Procedure Act does not require the DPP to provide reasons for entering *nolle prosequi*, it is difficult for the Court to test whether or not the DPP's entry of *nolle prosequi* is in conformity to the limitations set by the Constitution. This mischief is due to the reason that the DPP is not obliged by the law to disclose the reason for terminating a case.[70] The immunity from providing reasons preempts the Court from forming a conclusive opinion on whether or not the DPP acted properly.[71] The DPP may be able to exercise his powers in such a way that on the face of it he is acting legally but in reality, he is acting unjustly to the accused persons and particularly so when his intention is to re-arrest and recharge them immediately after they are discharged as the law permits him to do so.[72] He may base his decision on the factors other than the interest of justice. These factors may be extraneous to the need to enforce the law or to do justice.

Moreover, the problem is influenced by the fact that the statute does not show if the Court has power to reject the DPP's application of *nolle prosequi*, as a result once the DPP enters *nolle prosequi*, the Court grants the application.[73]The Criminal Procedure Act states that once *nolle prosequi* is entered in the Court by the DPP, the Court shall discharge the accused person.[74] The word "shall" is interpreted as imperative.[75] Therefore, once the

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70 Sayi, P.R., "Crime Victims' Remedy against a DPP Decision not to Prosecute in Tanzania" 1 (10) *International Journal of Science Arts and Commerce*, 2016 at p. 5.

71 *Bahati Moshi t/a Ndono Filling Station v. Camel Oil,* Civil Appeal No. 216 of 2018, High Court of Tanzania (Dar es Salaam District Registry) at Dar es Salaam, dated 10/10/2019 (Unreported) at p. 6.

72 *Above note 9 at p. 3.*

73 Mwalili, J. J., *The Role and Function of Prosecution in Criminal Justice*: 107th International Training Course Participants' Paper at p. 224, Available at https://www.unafei.or.jp/publications/pdf/RS_No53/No53_23PA_Mwalili.pdf. retrieved on 19 October 2021.

74 Section 91 of the Criminal Procedure Act, Cap. 20 [R.E 2019].

75 S. 53 (2) of the Interpretation of Laws Act, Cap. 1 [RE 2019].

DPP enters *nolle prosequi* in Court, the Court has no option than to discharge the accused person.

The position of Mainland Tanzania can be differentiated from the position of Zanzibar. In Zanzibar, the Constitution of Zanzibar empowers the Court to check on whether or not the DPP is exercising his powers properly. The Constitution of Zanzibar states that:

> In exercising his powers according to the provision of this Article the Director of Public Prosecutions is not bound to follow any order or direction of any person or any government department. But the provisions of this Article will not bar the Court from using its power for the purpose of investigating whether the Director of Public Prosecutions is exercising his powers according to the provisions of this Constitution or not.[76]

The Constitution of Zanzibar clearly shows the power of the Court over the DPP, unlike in Mainland Tanzania where neither the Constitution nor other laws clearly express the mandate of the Court over the DPP. Lack of express provision showing the powers of the Court over the DPP has caused confusion on whether or not the Court can control the DPP exercise of *nolle prosequi*.[77]

8. ATTITUDE OF THE COURT OVER *NOLLE PROSEQUI*

The attitude of judicial officers towards *Nolle Prosequi* at any stage before the verdict of the Court is not positive. Exercise of *nolle prosequi* has been shaming

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[76] Art. 56A (7) of the Constitution of Zanzibar of 2010.See also above note 68 at p. 17.

[77] Above note 68 at p. 17.

the law profession.[78] Analysis of the cases, in which the DPP employed *nolle prosequi,* indicates that Courts are not happy with the DPP's practice of terminating and re-instituting the case.[79] In showing that the court is not encouraging unnecessary application of *nolle prosequi* Mruma J., had this to say:

> I can see no justification for the prosecution to withdraw the charge against the accused under section 91 (1) of the CPA at this stage and more so after it has called four witnesses. It would be abuse of statutory powers if the prosecution is allowed to withdraw a case and file the same case again and again. This in my view could lead to persecution instead of prosecution. If the prosecution's prayer is granted, then it means presumably that sooner or later they can commence the same case under a different number and then withdraw and file it again, and then withdraw and file it again and so on and so forth *ad infinitum*. This is an abuse of court process which if condoned may result into a substantial miscarriage of justice.[80]

The Court is not encouraging re-institution of cases because the DPP may learn areas of weakness in his case which will be cured in the new case. In so doing, the accused will be prejudiced in the defence, for the DPP having learned from the court proceedings what they ought to do.[81] Justice Masaju is of the view that the courts of law are there essentially for administration of justice. They are neither DPP's nor anybody's moot courts typical of law schools practice so much that whenever either party to the case learns of any

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78 Above note 26 at p. 6.

79 *Fadhili Hassan @ Mwemi Mkoma v. The Republic,* DC Criminal Appeal No. 58 of 2019, High Court of Tanzania, at Dodoma (Unreported) at pp. 3-4.

80 Above note 9 at p. 3.

81 *Ibid.*

weakness of its case at any stage of the case prays to terminate and start afresh when the interest of justice is to the contrary. The DPP should always prosecute cases competently and diligently in Courts of law.[82] Since n*olle prosequi* may be entered even after defence, it enables the prosecution to learn areas of weakness in his case, improve the weakness and re-file the case to the Court. This practice should not be encouraged as it jeopardises the accused person's defence and it goes against the interest of justice.[83]

9. CONCLUSION AND RECOMMENDATIONS

9.1 CONCLUSION

Under the Constitution of the United Republic of Tanzania, the Court is vested with final authority in dispensation of justice.[84] In dispensation of justice, the Constitution guarantees Courts with independence and freedom save for only adhering to the Constitution and other laws of the land.[85] The enormous power that the DPP is given by the law, especially in his right to enter *nolle prosequi* and reinstitution of the case on the same facts appear to be unconstitutional and defeat the supremacy of the Court in dispensation of justice. This is due to the fact that the Court has no opportunity to weigh out whether or not the DPP has a justifiable cause to terminate the proceedings. Also the Court is not empowered to reject the re-institution of the same criminal case upon entering *nolle prosequi* by the DPP. As a final arbiter in administration of justice the Court must have powers to question the manner and timing of the exercise of *nolle prosequi* right and re-institution of the case. The authors do not opine that the Court should be absolutely free from check and justifiable interference. The authors submit that the check and

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82 *Ibid.*

83 *Iddi Abdallah @ Adam v. Republic*, Criminal Appeal No. 202, Court of Appeal of Tanzania at Mwanza (Unreported); see also note 79 at p. 19.

84 Art. 107A (1) of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 [R.E 2002].

85 *Ibid*, art. 107B.

interference to the Court should be those resulting to uphold of justice and are prescribed by law.

9.2 RECOMMENDATIONS

The authors give recommendations in curbing the stated quandary. The relevant laws particularly the Criminal Procedure Act should be amended to impact the following in as far as exercise of *nolle prosequi* by the DPP is concerned:

9.3 Establishing Good Cause before Entering *Nolle Prosequi*

The Criminal Procedure Act as it stands does not obligate the DPP when entering *nolle prosequi* to state any reason or ground towards such exercise.[86] This makes the exercise of entering *nolle prosequi* prone to discretionary abuse. The criminal justice system of the United Republic of Tanzania should pick a lesson from other jurisdictions where the DPP is required to provide reasons before withdrawing a case.[87] Stating reasons before making any decision is key under principles of natural justice.[88] It is indeed good practice to assign reasons for termination through entering *nolle prosequi.*

9.4 Prohibiting Subsequent Prosecution on the same Facts after Discharge

Under the Criminal Procedure Act of Tanzania, a termination of the case by *nolle prosequi* is never a bar to subsequent proceedings against the accused person on the same fact.[89] To make a DPP not use this legal possibility against the rights of the accused persons there should be no subsequent prosecution on the same facts after discharge by *nolle prosequi*. The guidance in the Republic of Vanuatu where a discharge of an accused person on

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86 S. 91 of the Criminal Procedure Act Cap. 20, [R.E 2019].

87 The Prosecution of Offences, 1985, Cap. 1985, section 24.

88 Harloveleen, K., *An Introduction to Administrative Law*, (15thEdn.), Punjab: Central Law Publications, 2011, at p. 73.

89 S… of the Criminal Procedure Act Cap. 20, [R.E 2019].

account of *nolle prosequi* operates as a bar to subsequent proceedings on the same facts should be emulated.[90] In other words, such discharge operates as an acquittal. Such effect of the exercise of right to enter *nolle prosequi* will result in reconsideration prior to entering *nolle prosequi* on the part of DPP if there are any intentions of re-institution of the same criminal case based on the same facts.

9.5 Accused's Right to be Heard before Entering *Nolle Prosequi*

As noted, under the laws of the United Republic of Tanzania, the accused person is not given any opportunity to be heard on the decision of the DPP to withdraw a case by entering *nolle prosequi*. Thus, section 91 of the Criminal Procedure Act violates the principles of natural justice particularly the right to be heard. It is submitted that, to uphold the interests of justice and of the accused person as a party to the case, section 91 of the Criminal Procedure Act should be amended to give the accused person a right to respond to the notice of the DPP terminating the case by entering *nolle prosequi*.

Also section 91 of the Criminal Procedure Act should be amended to the extent that the Court should be afforded reasons for such action especially where the parties have been heard in full and termination of the proceedings through nolle prosequi is made just before judgment is delivered. This is due to the fact that such termination is motivated by reinstitution of the same case amounts to abuse of powers and it makes the criminal justice system unfair and unpredictable.

9.6 Period Limiting the Effect of *Nolle Prosequi*

In an alternative but without prejudice to what has been recommended under item 9.2, it is hereby recommended that, when the accused person has already started to give his or her defence, the effect of *nolle prosequi* should be to acquit the accused person. That is to say, when *nolle prosequi* is entered when the

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[90] See the Criminal Procedure Code, 1981, Cap. 136, [Consolidated Edition 2006].

accused person has already started to give his or her defence, discharge on account of *nolle prosequi* should have the effect of acquittal and not discharge. Precisely speaking, there should be no difference of the effect of the withdrawal in subordinate courts under section 98 of the Criminal Procedure Act and *nolle prosequi* under section 91 of the same Act.

It is our firm view that in case these aspects are addressed by putting in place a legislative framework to address the anomalies, the DPP will exercise the powers to enter *nolle prosequi* sparingly and prudently to minimize abuse of the criminal justice system. Such initiatives ensure protection of accused persons by treating them humanly, treating them as innocent until proved by competent authorities and fair hearing.