IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2019

CORAM: ANSAH, JSC (PRESIDING)

DOTSE, JSC

YEBOAH, JSC

PWAMANG, JSC

MARFUL-SAU, JSC

DORDZIE (MRS), JSC

KOTEY, JSC

WRIT NO.

J1/8/2019

19TH JUNE 2019

GREGORY AFOKO

BUREAU OF NATIONAL INVESTIGATIONS
REGIONAL OFFICE
ACCRA ..... PLAINTIFF

VRS

ATTORNEY- GENERAL

OFFICE OF ATTORNEY – GENERAL
MINISTRY OF JUSTICE
ACCRA ..... DEFENDANT

J U D G M E N T

MARFUL-SAU, JSC: - The plaintiff in this writ before us, is not questioning the constitutionality of the power of nolle prosequi vested in the Attorney- General in criminal prosecutions in our courts. The plaintiff in the main is urging us, through his

writ, to determine whether the nolle prosequi entered by the Attorney- General in his case as an accused person is fair and just in terms of Articles 11 (7) and 296 of the Constitution, particularly, Article 296 (c). It is thus important, to make it clear, in this judgment that this writ is not invoking the jurisdiction of this court to determine the constitutionality or otherwise of the right vested in the Attorney-General to enter nolle prosequi in criminal trials.

The plaintiff by his writ invoking the original jurisdiction of this court sought the following reliefs: -

''1. A declaration that the statutory exercise of the power to enter a nolle prosequi on the 28th January, 2019, pursuant to S. 54 of the Criminal and Other Offences (Procedure) Act, 1960, Act 60, by the defendant in the case of Republic v. Gregory Afoko, Case No. CR 180/16, is inconsistent and a violation or infringement of Articles 23 and 296 of the 1992 Constitution and as a result unconstitutional, null and void.

2. An order setting aside the said nolle prosequi and that the High Court, Accra should continue to hear the case of Republic v. Gregory Afoko, Case No. CR 180/16 to its logical conclusion.

3. A further order terminating the purported prosecution of the plaintiff by the defendant in the case Republic v. Gregory Afoko and Asabke v.Alangdi, Case No. G/AC/DC/B1/05/19 or any further prosecution of plaintiff in respect of facts arising and forming the basis of the prosecution of the plaintiff in Republic v. Gregory Afoko Case No. CR 180/16.

4. Any further order that this honourable Court may deem fit for the enforcement of its orders.''

The brief facts of the case deduced from the processes filed before this Court, are that on the 21st May 2015, the plaintiff was arrested on suspicion of murdering one Adams Mahama, after pouring acid on the said Adams leading to his death. After investigations and committal proceedings the plaintiff was arraigned to stand trial at the High Court, Accra for the offence of murder. The trial proceeded and the plaintiff closed his defence on the 24th January 2019. The trial Judge then adjourned the case to the 20th February 2019 for addresses by the prosecution and defence, after

which a date was to be fixed for summing up and then the final verdict by the jury. However, on the 28th January, 2019, the Attorney -General, the defendant herein filed a nolle prosequi indicating her intention to discontinue the case intituled Republic v. Gregory Afoko. The defendant herein subsequently re-arraigned the plaintiff with one Asabke Alangdi before the District Court, Accra for fresh committal proceedings.

The plaintiff contends that the exercise of the right of nolle prosequi by the defendant in his trial is inconsistent with or is in contravention of Articles 23, 11, and 296 of the Constitution. The defendant, first of all, has argued that the plaintiff's writ is incompetent as it does not properly invoke the original jurisdiction of this court, under Articles 2 (1) and 130 (2) of the Constitution. In the alternative, the defendant disputes the claim by the plaintiff and asserts that the exercise of the right of nolle prosequi, under section 54 of the Criminal and Other Offences (Procedural) Act, Act 30 of 1960, does not breach the Constitution and urged this Court to dismiss the writ issued by the plaintiff.

On these facts and the reliefs sought by the plaintiff, the parties herein jointly filed a memorandum of agreed issues on the 25th of April 2019, pursuant to rule 50 of the Supreme Court Rules, 1996, CI 16. By the said memorandum, the parties agreed on two issues for the trial. These are: -

1. Whether or not the instant action properly invokes the original jurisdiction of the Supreme Court in accordance with articles 2 (1)(b) and 130 (1) of the Constitution.

2. Whether or not the exercise of the power of nolle prosequi by the Attorney-General is subject to the requirement of articles 296 (c) and 11(7) of the Constitution.

We shall now address the two issues in seriatim. In his submission on the issue of jurisdiction of this court, learned Counsel for the defendant referred to the much-adored case of **Republic v. Special Tribunal; Exparte Akosah {1980} GLR 592**, in which the ambit of the original jurisdiction of this court in enforcing or interpreting the Constitution was well defined. Learned Counsel for the defendant also did refer to the case of **Osei -Boateng v. National Media Commission and**

Appenteng {2012} 2SCGLR 1038, in which this Court made the requirement of an ambiguity, imprecision or lack of clarity in a constitutional provision, a condition precedent for the exercise of this court's exclusive original jurisdiction to enforce or interpret the Constitution, under articles 2 (1) and 130 of the Constitution. The defendant's Counsel reiterated the time-honoured need for this Court to guard against the abuse of this special jurisdiction, by parties who would want to camouflage their cases as enforcement and interpretative in nature.

It was further argued by Counsel for the defendant that plaintiff's writ does not raise any real issue for constitutional interpretation. Counsel contended that the plaintiff's action is a disguised application for judicial review of the decision of the defendant to enter nolle prosequi and thus not cognisable within the original jurisdiction of the court. The defendant finally argued that the power of the defendant to enter nolle prosequi is implied under article 88(3) of the Constitution, so if the plaintiff is aggrieved by the exercise of that power then his remedy, if any at all, is for judicial review or an appeal and not to invoke the original jurisdiction of this court.

The plaintiff who set out in his statement of case to demonstrate that he had properly invoked the original jurisdiction of this court, referred us to the case of **Kor v. Attorney- General and Justice Douse & Others {2015-2016} 1 SCGLR 114.** Counsel for plaintiff argued that the complaint of plaintiff is that the exercise of the right of nolle prosequi by the defendant in the circumstances of his case is inconsistent with article 296 of the Constitution. The plaintiff was therefore seeking a declaration and enforcement of his claim under article 2 (1) and 130 (1) (a) of the Constitution. Plaintiff Counsel contended that this court's original jurisdiction has properly been invoked.

At this stage, there is the need to reproduce the provisions in articles 2 (1) and 130 (1) (a) of the Constitution by which the plaintiff seeks to invoke our jurisdiction:'

''2 (1)A person who alleges that—

(a) An enactment or anything contained in or done, under the authority of that or any other enactment; or

(b) Any act or omission of any person:

is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect.''

''130 (1) Subject to the jurisdiction of the High Court in the enforcement of the Fundamental Human Rights and Freedoms as provided in article 33 of this Constitution, the Supreme Court shall have exclusive original jurisdiction in---

(a)all matters relating to the enforcement or interpretation of this Constitution; and

(b)all matters as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person by law or under this Constitution.''

Having carefully considered the submissions by both counsel, we are of the firm opinion that, the case set out in the writ by plaintiff, is one of enforcement based on the contention that the exercise of the right of nolle prosequi by the defendant, under section 54 of Act 30 is inconsistent with article 296 of the Constitution. The plaintiff by his writ is not inviting this court to interpret any provision of the constitution. What the plaintiff seeks to do in this action, is to invoke the enforcement powers of this court under articles 2(1) and 130 (1) (a) of the Constitution. The writ raises a genuine issue in controversy regarding the alleged breach of article 296 (c) of the Constitution. For this reason, we hold that the writ is properly before this court and we dismiss the objection raised to the jurisdiction of this Court.

Beside the arguments submitted to us by both Counsel on the issue of jurisdiction, we believe appropriately, that once the nolle prosequi was entered in a pending proceeding as it were, Counsel for plaintiff, could have applied to the trial High Court, to refer the issue about the alleged unconstitutional exercise of the right to enter nolle prosequi in terms of article 296, to this court, under our reference jurisdiction, under article 130(2) of the Constitution. This would have saved the plaintiff from issuing the writ. We do not think, however, that failure to apply for a

reference to this court, under article 130 (2), would be sufficient ground to bar the plaintiff from taking the writ. In effect, we hold that the plaintiff is properly before this court.

Having assumed jurisdiction in the matter, we now address the second issue adopted by the parties to be tried. That issue is whether or not the exercise of the power of nolle prosequi by the Attorney-General is subject to the requirements of articles 296 (c) and 11(7) of the Constitution. For purposes of sound reasoning, the said articles are re-produced below: -

''296. Where in this Constitution or in any other law discretionary power is vested in any person or authority—

a) that discretionary power shall be deemed to imply a duty to be fair and candid;

b) the exercise of the discretionary power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of law; and

c) where the person or authority is not a judge or other judicial officer, there shall be published by constitutional instrument or statutory instrument, regulations that are not inconsistent with the provisions of this Constitution or that other law to govern the exercise of the discretionary power.''

Article 11(7)

''Any Order, Rule or Regulation made by a person or authority under a power conferred by this Constitution or any other law shall—

(a)be laid before Parliament;

(b)be published in the Gazette on the day it is laid before Parliament; and

(c)come into force at the expiration of twenty-one sitting days after being so laid unless Parliament, before the expiration of the twenty-one days,

annuls the Order, Rule or Regulation by the votes of not less than two-thirds of all the members of Parliament.''

The processes filed in this case are evident that the plaintiff has been in lawful custody since his arrest on 21st May 2015 and subsequent prosecution. His trial by the High Court, Accra was almost drawing to a close when the defendant exercised her right to enter nolle prosequi to discontinue the trial, only to be arraigned before another District Court, for a fresh trial. The plaintiff's case simply is that, in the circumstances of his trial, the exercise of the power of nolle prosequi by the defendant, is unfair and as such inconsistent with article 296 of the Constitution, particularly article 296 (c). This therefore forms the basis of the second issue to be determined.

The defendant derives its power to prosecute from article 88 (3) and (4) of the Constitution, which provides as follows:

''(3)The Attorney-General shall be responsible for the initiation and conduct of all prosecutions of criminal offences.

(4) All offences prosecuted in the name of the Republic of Ghana shall be at the suit of the Attorney-General or any other person authorised by him in accordance with any law.''

The power of the defendant to enter nolle prosequi in a criminal trial is specifically provided for under section 54 (1) of the Criminal and Other Offence (Procedure) Act, Act 30 of 1960, as follows: -

'' In a criminal case, and at any stage of a criminal case before verdict or judgment, and in the case of preliminary proceedings before the District Court, whether the accused has or has not been committed for trial, the Attorney- General may enter a nolle prosequi, by stating in Court or by informing the Court in writing that the Republic does not intend to continue the proceedings.''

Now, article 88 (3) of the Constitution gives the Attorney-General, the power to initiate and conduct all prosecutions of criminal offences. What then is the scope of

this power vested in the Attorney-General? The key words used in article 88 (3) are **'' initiation and conduct''**. What are the meanings of these words? ''**The Chambers 21st Century Dictionary,''** gives the ordinary definition of these words for our purposes as follows: -

'' To initiate means to begin something- to make something begin.

Initiation (Noun)—the formal beginning of something.

Conduct--- to lead or guide; to manage, or to control.''

With these definitions on our minds and upon careful reading of article 88(3) and section 54 of Act 30, we are convinced that the power of the defendant to enter nolle prosequi is implied and inherent in article 88(3). Our assertion is based on the fact that, the Constitution has not by any express provision taken away the power of nolle prosequi, provided under section 54 of Act 30. It is also an undisputed fact, that the entry of nolle prosequi, is one of many acts that the defendant is legally entitled to engage in during criminal prosecutions. By the said article, the defendant herein is constitutionally mandated to initiate and conduct all criminal prosecutions in the country. It must be reckoned that the act of conducting criminal prosecution involves the exercise of diverse acts of discretion. In conducting criminal prosecutions, the defendant may exercise any of the following acts of discretion, which may not be exhaustive;

a. the discretion whether or not to prefer charges and arraigne accused before a court;

b. discretion to charge accused persons separately or to charge accused persons jointly on one charge sheet;

c. discretion to withdraw charges and substitute new charges;

d. discretion to call a particular witness or not;

e. discretion to discontinue prosecution.

Clearly, therefore we hold the view that the power of the defendant to enter nolle prosequi forms part of defendant's constitutional mandate, under article 88(3) and

for that matter, it cannot be denied the defendant. Indeed, this point is conceded by learned Counsel for the plaintiff at paragraph 17 of his Statement of Case, in which he stated thus: -

''17. But my Lords, the case of the plaintiff is not that the defendant has no power to exercise her right of filing a nolle prosequi in a criminal trial such as the one in the trial Court involving the plaintiff. The plaintiff's plaint here is that the exercise of the power of filing the nolle prosequi is subject to Constitutional Provisions, with the coming into force of the 1992 Constitution and therefore any such exercise of the power of filing nolle prosequi must be consistent with the Constitution or else it is unconstitutional. In this instance, the nolle prosequi filed fell short of these Constitutional provisions.''

The question then is; did the filing of the nolle prosequi in Case No. CR 180/ 2016, in which the plaintiff herein was the accused person, breach any provisions of the Constitution? We note that the plaintiff in his writ and statement of case sought to show that the nolle prosequi filed by the defendant in his case violated articles 23, 296 and 11 of the Constitution. However, in settling the memorandum of issues, the plaintiff seems to have abandoned article 23 and even with article 296, plaintiff counsel narrowed in on article 296 (c).

In our candid opinion, article 23 was rightly abandoned by the plaintiff, since that provision has no relevance to the determination of this writ. Article 23 of the Constitution deals with Administrative actions and even where a breach of that provision is alleged the remedy lies to the High Court and not this court. Article 23 is part of Chapter 5 of the Constitution, dealing with Fundamental Human Rights and Freedoms, which by article 33 (1) and (2) of the Constitution ought to be enforced in the High Court. That article could not have offered any assistance to the plaintiff.

As already observed, the issue agreed to be tried regarding article 296 is restricted to whether the defendant in exercising the right of nolle prosequi had to comply with article 296 (c), requiring the publication of Constitutional or Statutory Instrument by persons or authorities who exercise discretionary powers other than Judges and other Judicial Officers. We will soon address the issue raised concerning article

296(c), but before then we shall briefly comment on how Counsel for plaintiff failed in his reliance on article 296 (a) and (b), which insist that such discretionary powers are exercised fairly and not arbitrarily, capriciously and biased. The plaintiff did not in his statement of case properly make out a case of bias, unfairness, arbitrariness or capriciousness in the entry of nolle prosequi by the defendant. Indeed, from the processes filed in this case, the plaintiff failed to adduce any evidence or allege any conduct on the part of the defendant in the exercise of her mandate, that could be used to measure the standard set by article 296 (a) and (b) of the Constitution.

The plaintiff only seemed aggrieved that the defendant exercised the right of nolle prosequi virtually at the end of his trial, but the defendant in so doing, acted within the law. The Criminal & Other Offences (Procedure) Act, Act 30, by its section 54, gave defendant the right to file nolle prosequi in a criminal trial at any time before the verdict or judgment. In plaintiff's case the nolle prosequi was entered, by his own account, before judgment. The defendant therefore did no wrong against the law, when she entered the nolle prosequi. The fact that plaintiff's trial was almost at the tail end, could not legally bar or restrain the defendant from exercising her right to enter nolle prosequi. Though, we sympathise with the plaintiff that his trial was not completed, but terminated as it were, for a new trial to begin, that in law does not amount to unfairness, arbitrariness, bias or capriciousness. In effect, the plaintiff failed to show how defendant breached article 296(a) and (b), of the Constitution.

Now we turn to address the issue as to whether the defendant in exercising the right to enter nolle prosequi needed to publish a Constitutional or Statutory Instrument, consistent with the Constitution, to regulate the exercise of that discretion, as required under article 296 (c). In this judgment, we have already alluded to the fact that the power to enter nolle prosequi vested in the defendant by section 54 of Act 30, is inherent in the constitutional mandate of the defendant under article 88(3) of the Constitution, to initiate and conduct criminal prosecutions in the country. The Attorney- General by article 88(1) is a Minister of State and the principal Legal Adviser to the Government. The Attorney- General is therefore a member of the Executive arm of Government, for that matter, the initiation and conduct of criminal

prosecution is an executive act vested in the Attorney- General, who is the defendant in this case.

The power to enter nolle prosequi, just like, the power to determine who is to be charged or who becomes a prosecution witness, and the power to withdraw a charge, by the defendant are clearly executive acts, which are exercised legally in accordance with article 88(3) and section 54 of Act 30. Now, if the argument by the plaintiff is allowed then what it will mean is that anytime, the defendant intends to exercise any of the above powers conferred on her by the Constitution, she had to first publish a Constitutional or Statutory Instrument, in accordance with articles 296 (c) and 11(7), to regulate the exercise of those acts of the defendant.

A decision such as what the plaintiff wants from this court will obviously stifle the mandate given to the defendant to perform by the very Constitution and will obstruct the prosecution of criminal cases. It is for this very reason that we agree with Akuffo- Addo, CJ, when he held in the case of **Captan v. Minister of Interior {1970} CC 35**, cited by Counsel for the defendant as follows: -

''There is a very loose sense in which it can be said that most decisions taken by ministers in the day to day performance of their ministerial duties involve the exercise of some discretion, and it is in this sense that the minister's act in revoking a residence permit may be said to involve the exercise of discretion. But can it be seriously argued that the exercise of discretion in this sense by ministers must comply with the requirements of article 173, and in particular, with article 173 (c) which requires that the minister shall 'make and publish Regulations... which shall govern the exercise of that discretionary power? The government could hardly govern if this were so...''

Now, with the coming to force of the 1992 Constitution, this court has had the opportunity to pronounce on the scope of article 296 (c) as it relates to the exercise of discretionary power. In the case of **Ransford France (No. 3) v. Electoral Commission & Attorney-General {2012} 1 SCGLR 705**, this court speaking through Dr. Date-Bah, JSC, delivered at page 723 as follows: -

''We would continue to be persuaded of the need for the Supreme Court to interpret the Constitution as a living document, so to speak. This remains the preferable route to distilling the right meaning from the 1992 Constitution. Accordingly, article 296(c) has to be interpreted as part of a living Constitution that provides a workable and functional framework for governance in Ghana. An interpretation that leads to nuclear meltdown, as it were, of government should be avoided. That is why the cue given by Akufo- Addo, CJ in the Captan case(supra) needs to be taken up. This court should follow the highly persuasive authority of Captan. The obligation to make regulations should be limited to discretion which is quasi-judicial situations. By that we mean where adjudication is involved.''

The issue that confronted this court in the Ransford France case, among others was whether the Electoral Commission in the exercise of its functions and discretionary power in creating new constituencies, was required to make by constitutional instrument, regulations not inconsistent with the Constitution or any other law to govern the exercise of its discretionary power, as required under article 296 (c). This court as demonstrated above held that it is not with the exercise of every discretionary power that must meet the requirement of article 296 (c) of the Constitution. This court rightly in our minds resorted to a purposive interpretation of article 296 (c) to avoid the absurdity that will occur with any literal interpretation of the said article, that every exercise of discretionary power, as a condition precedent, ought to meet the requirement of article 296 (c), with the publication of a Constitutional Instrument, before the discretion is exercised.

There is no dispute that the Ransford France case fits the facts of this case, affirming the position we had earlier taken, that, the discretion exercised by the defendant to file nolle prosequi, among others, is executive in nature and should not be subject to article 296 (c), of the Constitution. To hold otherwise, as indicated, will impede criminal prosecutions, since every discretion to be exercised in the conduct of criminal trials, will have to be preceded by the publication of a Constitutional Instrument. We are therefore, in accord with the decision of this court in the

Ransford France case, that article 296(c), should be restricted to the exercise of discretion in the nature of quasi-judicial. In effect it should not be expanded to the exercise of executive acts, such as the power to file nolle prosequi.

At page 723 of the Ransford France case (supra), Dr. Date- Bah, JSC concluding his opinion stated thus: -

''Restricting the scope of article 296 (c) by purposive interpretation is not equivalent to removing due process from the exercise of discretionary power. Clauses (a) and (b) of article 296 contain the standards for the application of such process. Those two clauses of article 296, read in conjunction with article 23, assure residents in Ghana of fairness and impartiality in administrative processes. Limiting the scope of the obligation to publish regulations before the exercise of discretionary power does not significantly impair due process in administrative powers in Ghana; rather it avoids the unravelling of the system of government as we have known it since 1969. The standard embodied in article 296 (c) may well offer a desirable benchmark for good practice and we commend it to those who exercise discretion to adhere to it whenever practicable, but non-compliance with it should not be treated as resulting in invalidity, for reasons already explained above.''

We are very much persuaded by the above opinion and endorse same in this judgment, for the very reason that even though no regulations were published by the defendant before exercising the right to enter nolle prosequi, in the trial, the subject matter of this case, the plaintiff has had the right to subject the exercise of the discretion, to the standard of fairness, impartiality, arbitrariness and capriciousness under the article 296 (a) and (b) of the constitution. The institution of this case itself by the plaintiff affirms this right to ensure due process as required under article 296 (a) and (b). On the peculiar facts of this case, however, we hold the view, as already indicated, that the plaintiff has not been able to make out a case that defendant failed to measure up to the constitutional standards stipulated in article 296 (a) and (b).

In answering the second issue settled by the parties for determination, we hold that the exercise of the power of nolle prosequi is not subject to the requirements of articles 296(c) and 11(7) of the Constitution. As demonstrated in this judgment, the exercise of the power of nolle prosequi is an executive act and not a quasi-judicial act for which, as this court has held, need to satisfy the requirements of article 296 (c) of the Constitution. Indeed, if the defendant is not required to adhere to article 296(c) of the Constitution, then article 11(7) has not been breached. For the reasons expressed in this judgment therefore, we will dismiss this action commenced by the plaintiff. The writ is accordingly dismissed.

S. K. MARFUL-SAU
(JUSTICE OF THE SUPREME COURT)

PWAMANG, JSC:-

In this case, the plaintiff, an accused person who was standing trial on a charge of murder in the High Court, Accra, has complained against the filing by the defendant of a *nolle prosequi* in the case, only for her to immediately re-arraign him before a District Court for fresh committal proceedings. The trial of the plaintiff was almost at an end as the prosecution and the accused person had closed their respective cases and what remained was addresses by counsel, summing up by the trial judge and rendering of a verdict by the jury. Though, by his writ of summons, the plaintiff limited his reliefs to his particular case, the briefs written by both parties raised substantial points of law with regard to the general nature and constitutional limitations of the defendant's authority to enter *nolle prosequi* in any criminal case as provided by Sec**tion 54 of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30).** *Nolle prosequi* is a Latin term which means that there would be no prosecution and it is filed to terminate pending criminal proceedings against an accused person. When it is filed in a case or stated by the Attorney-General during court proceedings, the accused person is discharged by the court. However, it does not bar his subsequent prosecution for the same offence on the same facts. By Section 54 of Act 30, *nolle prosequi* may be filed at any time before judgment.

If I understand the plaintiff well, his case is that, having regard to the stage his trial before the High Court had reached, the defendant was unfair, unreasonable and not candid towards him by filing a *nolle prosequi* to discontinue the prosecution only to turn round and take him through another trial on the same facts. That being the stand of the plaintiff, it was expected that, in addition to the enactments relied upon by him, he would have called in aid Article 19 of the 1992 Constitution on fair trials but he did not. The plaintiff grounded his reliefs on Articles 23 and 296 of the Constitution. Article 296 is the more appropriate provision that is applicable on the facts of plaintiff's case and it provides as follows;

"Where in this Constitution or in any other law discretionary power is vested in any person or authority –

(a) that discretionary power shall be deemed to imply a duty to be fair and candid;

(b) the exercise of the discretionary power shall not be arbitrary, capricious or biased wither by resentment, prejudice or personal dislike and shall be in accordance with due process of law; and

(c) where the person or authority is not a judge or other judicial officer, there shall be published by constitutional instrument or statutory instrument, regulations that are not inconsistent with the provisions of this Constitution or that other law to govern the exercise of the discretionary power."

It is obvious from these provisions that the charges of unfairness and unreasonableness against the defendant in this case are founded on clauses (a) and (b) of Article 296. When clause (b) talks of due process, it must be remembered that it covers the two components of the term namely; procedural and substantive due process. However, when the parties filed a joint memorandum of issues to be tried by the court, no issue on whether the particular *nolle prosequi* entered on 28th January, 2019 was unfair or unreasonable was set down by the parties for trial by the court. The issues agreed between the parties are as follows;

1. Whether or not the instant action properly invokes the original jurisdiction of the Supreme Court in accordance with articles 2(1) (b) and 130 (1) of the Constitution.
2. Whether or not the exercise of the power of *nolle prosequi* by the Attorney-General is subject to the requirements of articles 296(c) and 11(7) of the Constitution.

With the above as the agreed issues, I am intrigued that both parties spilt substantial ink on fundamental issues with regard to the architecture of 1992 Constitution which issues, in my opinion, require definitive determination by the Supreme Court. The issues touched on in the written briefs included; whether the power of the Attorney-General to enter *nolle prose*qui derives from Article 88 of the Constitution or from Section 54 of Act 30 alone; whether the power of the Attorney-General to enter *nolle prosequi* takes the nature of a royal prerogative or it is a discretionary power subject to the regular jurisdiction of the courts for judicial review, and; whether, in view of Article 296(a) and (b), Republic v Abrokwa [1989-90] 1 GLR 385 is still good law. It appears to me that it is after the court has decided these fundamental constitutional questions that it can, in a comprehensive way, determine issue (ii) in this case, which is the only substantive issue for trial placed before the court by the parties.

I draw attention to these matters because I have observed that at times lawyers do not pay sufficient attention in the drawing up of issues for trial on the basis of their pleadings in a case. But what must be recognized is that, in Ghana, our law is founded on the common law system and the identification of issues for trial in each case is critical because of the doctrine of precedent. A determination by a court of an issue which was not joined by the parties for trial in a case becomes obiter dicta and can be distinguished as non binding. Therefore, for now, I do not intend to expend mental effort on the fundamental issues I have referred to above as the parties have only touched on them without setting them down for trial. It would have been a different matter if the court had directed the parties to address us along the lines of these fundamental questions.

Nonetheless, I will express myself briefly on the substantive issue before the court. But before doing so, I wish to record my agreement with the lead opinion that the plaintiff by his writ of summons has properly invoked the jurisdiction of the court so the case is properly before us. On the substantive issue, I have noted from the statement of case of the defendant that she appears to concede that in the current legal framework in Ghana, the Attorney-General's authority to enter *nolle prosequi* is a discretionary power and is subject to judicial review. At paragraph 16 of her statement of case, the defendant submitted as follows;

"16. It is our respectful submission that to the extent that the burden of the complaint of the plaintiff is about the manner in which the prerogative of nolle prosequi was exercised by the Attorney-General without regard to the requirements of fairness, the instant action lies in the realm of a judicial review action. The court will note that most of the foreign decisions relied upon by the counsel for plaintiff in the plaintiff's statement of case dealt with judicial review applications. The essence of the holdings in those cases was that the Attorney-General's entry of nolle prosequi was subject to the judicial review powers of the court. ***In our respectful submission, articles 88 and 296 are clear. No ambiguity exists about it. Thus, if plaintiff is aggrieved by an exercise of the prerogative of nolle prosequi by the Attorney-General, he ought to have applied for judicial review at the High Court. In the alternative, plaintiff could have applied to the trial court for an order setting aside the decision to enter nolle prosequi. This, he failed to do and rushed to this Honourable Court invoking the original jurisdiction of the Court." (emphasis supplied)***

That notwithstanding, the defendant argued that the entry of *nolle prosequi* is a purely executive discretionary power and that Article 296(c) does not apply in the case of purely executive powers. She relied on the Supreme Court case of **Captan v Minister of Interior (1970) CC 35.** What ought to be noted about that decision is that the court held in that case that the day to day decisions of the executive in the performance of their ministerial duties would not require the publication of regulations. Similarly, in the case of **Ransford France (No 3) v Electoral**

Commission & Attorney-General [2012]1 SCGLR 705, this court was of the same view that, not all discretionary power is subject to the requirement to publish regulations as provided for by Article 296(c). But it cannot be contested that there are certain species of executive discretionary powers that were intended to be covered when the framers of the Constitution, 1992 inserted the provision in Article 296(c). After all, the provision excluded judicial discretionary power. So, the relevant question that arises on this issue is, whether the power of the Attorney-General to enter *nolle prosequi*, which both parties have agreed is a discretionary one, can be said to be within the intendment of Article 296(c). This question can be answered without determining whether the power of *nolle prosequi* derives from the Constitution or Act 30 because, Article 296 is expressed to apply to discretionary power conferred by the Constitution or any other law.

There are varied circumstances that may lead to, or better still, have led to, Attorney-Generals filing *nolle prosequi* in criminal cases in Ghana and in other common law jurisdictions. It may be entered by an Attorney-General to terminate a private prosecution embarked upon by a complainant who was compelled to initiate prosecution because the Attorney-General failed to act on her complaint for reasons best known to the Attorney-General. For now, I am not aware of such a case in Ghana but such circumstances led to some of the international jurisprudence on *nolle prosequi* that the parties referred to in their written briefs. Such were the circumstances in the Nigerian case of **The State v Ilori & Ors (1984) 5 N.C.L.R. 40** and the Privy Council case of **Jeewan Mohit v DPP of Mauritius [2006] UKPC 20.** In the case of Jeewan Mohit v DPP of Mauritius (supra) the Board observed that the recent experience of the United Kingdom showed that it was only on two occasions that the Attorney-General entered *nolle prosequi* to terminate pending criminal proceedings and in both cases it was because the accused persons were too sick to go through prosecution. Another reason for which prosecution of offenders may be terminated is on account of international relations such as the BAE Systems plc case in the UK in 2006, but in that case the discontinuance was not by way of *nolle prosequi*. In all of the above situations, the accused persons are not subsequently put on trial.

Then there are those cases where the Attorney-General, upon a review of the proceedings in a case, detects fatal flaws in the case of the prosecution which may lead to the acquittal of an accused person so, in order to avoid a possible verdict against the prosecution, she may enter a *nolle prosequi*. See **A.N.E. Amissah; "Criminal Procedure in Ghana". 1985 Reprint, page 22.** In such cases, the accused person may be re-presented to another court for prosecution on the same facts after the technical defect in the prosecution's case has been rectified. It appears from the record that the case of the plaintiff may fall into this category. As mentioned above, in recent times, technical defects is not used as the ground for *nolle prosequi* in England and Wales where our rule originated from. In such circumstances, prosecutors, with the consent of the Attorney-General, would instead seek the leave of the court to withdraw from the prosecution of the accused person.

Section 59 of Act 30 contains the provisions on withdrawal from prosecution in Ghana and the legal incidents of withdrawal, depending on the stage the case has reached, are different from termination by *nolle prosequi.* Unfortunately, Section 59 of Act 30 limits the exercise of the discretion to only trials and proceedings before a District Court whereas most of the prosecutions that the Attorney-Generals in Ghana have had cause to terminate are cases before the High Court. Section 59 of Act 30 appears to me to be the provision intended to be called upon when, midway in a case, the prosecution entertains doubts about the technical propriety of the prosecution. In 2002, the Federal Rules of Criminal Procedure of the United States were amended and dismissal of charges and indictments, which is equivalent to nolle prosequi in that jurisdiction, made subject to leave of the court and consent of the accused person. Whenever there is a review of our Criminal and other Offences (Procedure) Act, Section 59 should be taken a look at and possibly amended to cover cases in the High Court as well.

Whenever prosecution of a suspected offender is a matter of high public interest and the prosecution is terminated either by *nolle prosequi* or other means, it has generated a lot of controversy within the public domain. In my view therefore, *nolle prosequi* is not one of those regular duties that an Attorney-General performs in the course of her daily work. It is a discretionary power that is exercised only from time

to time, supposedly in the public interest, and after taking into consideration a number of weighty factors. In the instant case, the exercise of the discretion has substantial effects on the criminal justice rights of the plaintiff who is being subjected to another arduous trial after four years of a first one. It is equally of interest to the relations of the victim of the offence and has consequences for public confidence in the fairness and independence of our of criminal justice system in general.

The purpose of Article 296(c) is to infuse transparency in the exercise of discretionary powers and thereby check abuse of discretion by those upon whom it is conferred. In the case of *nolle prosequi,* with which we are concerned in this case, published regulations would assure the public that the Attorney-General can be held legally accountable and furthermore, published regulations would provide a framework within which, if the exercise of the discretion of *nolle prosequi* is challenged, a court can judge the fairness and reasonableness of the *nolle prosequi* on a case by case basis. In fact, there have been instances where Attorney-Generals under public pressure, have disclosed the considerations that led to the entry of *nolle prosequi*. In October 1976, the Attorney-General of Ghana went public to explain the factors that led to the entry of *nolle prosequi* in the case of **The Republic v El Helou & Ors** which involved high public interest. In recent times, the Attorney-General offered an explanation for the *nolle prosequi* entered to terminate the prosecution of Kwasi Kyei Darkwa, a popular Ghanaian broadcaster. Is a person in the situation of the plaintiff in this case, who is directly affected by the Attorney-General's exercise of her discretion, not entitled to know beforehand the factors that were taken into consideration in filing the *nolle prosequi* in his case?

The decisions to prosecute and to terminate prosecution of suspected offenders is a matter of immense public interest. Furthermore, it affects the rights of the suspected offenders who may be compelled to suffer the indignation of prosecution when there is seriously no point in mounting prosecution on the facts of the case. It is because of these considerations that the modern trend in democracies is for prosecutorial authorities to be open about the factors on which they take the decisions to initiate or terminate prosecutions. In Canada, the Attorney-General of Canada in 2008 and

2014, acting in consultation with the Director of Public Prosecutions (Federal) and under provisions of their Director of Public Prosecutions Act, issued directives to guide prosecutors as to the factors to consider when exercising prosecutorial powers. These directives are to ensure that prosecutors act fairly and reasonably to all persons affected by their decisions. England and Wales adopted and published a Code for Crown Prosecutors that must be strictly observed by prosecutors. Permit me to quote an introductory part of the revised code of 2004;

"The decision to prosecute an individual is a serious step. Fair and effective prosecution is essential to the maintenance of law and order. Even in a small case a prosecution has serious implications for all involved — victims, witnesses and defendants. The Crown Prosecution Service applies the Code for Crown Prosecutors so that it can make fair and consistent decisions about prosecutions."

I am aware that the code would not apply in the case of exercise of the power of *nolle prosequi* by Attorney-General of England and Wales who, by their unwritten constitution, is vested with the power to enter *nolle prosequi*. That is understandable because there, prosecutions are not at the suit of the Attorney-General as we have in Ghana by virtue of Article 88(4). Prosecutions are by the Crown Prosecution Service pursuant to the Prosecution of Offences Act 1985 and Crown Prosecutors have power to discontinue criminal prosecutions. Though the power to terminate criminal proceedings in any case by entry of *nolle prosequi* is vested in the Attorney-General of England and Wales, it is rarely exercised.

Thus, it is now globally accepted that the power to initiate and terminate criminal prosecutions must be exercised in accordance with published guidelines that ensure consistency in decisions, accountability of those on whom the power is conferred and guarantees transparency in its exercise. I am therefore of the firm opinion that the power of entry of *nolle prosequi* by the Attorney-General is subject to the requirements of Article 296 (c) and 11(7) of the Constitution and I so hold on issue (ii) in this case. However, that holding does not mean that the defendant was bereft of legal authority to file the *nolle prosequi* in the case involving the plaintiff in the High Court. I am in agreement with the lead opinion that she had authority to file it.

My view is that, even without the regulations that the defendant is required by Article 296 (c) to publish have not yet been enacted, her exercise of the power under Section 54 of Act 30 was lawful but it is subject to the court's jurisdiction to review its exercise in appropriate proceedings.

Flowing from my decision on issue (ii), I direct the defendant to draft and lay before parliament regulations on the filling of *nolle prosequi*. By way of Law Reform, I recommend that the defendant should give serious consideration to publishing regulations in respect of her other functions with regard to initiation, conduct and discontinuance of criminal prosecutions.

To conclude, I am unable to consider the reliefs prayed for by the plaintiff in his writ of summons as the issues agreed for trial did not cover them. I therefore concur in the conclusion reached in the lead opinion but on different grounds.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

ANSAH, JSC:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

DOTSE, JSC:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

V. J. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

YEBOAH, JSC:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

A. YEBOAH
(JUSTICE OF THE SUPREME COURT)

DORDZIE (MRS.), JSC:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

A. M. A. DORDZIE (MRS.)
(JUSTICE OF THE SUPREME COURT)

KOTEY, JSC:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

PROF. N. A. KOTEY
(JUSTICE OF THE SUPREME COURT)

COUNSEL

OSAFO BUABENG FOR THE PLAINTIFF.

GODFRED YEBOAH DAME, DEPUTY ATTORNEY WITH HIM YVONNE BANNERMAN (MS.) PRINCIPLE STATE ATTORNEY FOR THE DEFENDANT.