



**Director of Public Prosecutions v Kiptoo & 6 others (Criminal Revision
E1550 of 2024) [2024] KEHC 16692 (KLR) (Crim) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16692 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL REVISION E1550 OF 2024**

AM MUTETI, J

DECEMBER 20, 2024

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

AND

EDWARD KIPTOO 1ST RESPONDENT

STEPHEN MAINA GATIRA 2ND RESPONDENT

SAMUEL PATRICK NJUE 3RD RESPONDENT

ELIUD KIPCHOGE CHEPKWONY 4TH RESPONDENT

BINIFACE K LURARE 5TH RESPONDENT

JANE NASIMIYU MUSE 6TH RESPONDENT

SIMON KARANJA MAINA 7TH RESPONDENT

RULING

1. The applicant in this matter is the Director of Public Prosecutions. The Director has come to this court seeking to revise the decision of the learned Honorable R.K Ondieki SPM in Milimani Chief Magistrate's Court Criminal Case No. E380/ 2022 in which the learned Honorable magistrate declined to grant an application for the amendment of charges which would have also culminated into the withdrawal of the charges against the 5th and 7th respondents respectively.
2. The said amendment sought to have the 5th and 7th Accused person discharged from the case under Section 87 (a) of the Criminal Procedure Code.



3. The learned Honorable magistrate declined to grant the application and stated that:

“...the application for amendment of the charge of the 5th and 7th Accused persons under Section 87 (a) of Criminal Procedure Code proposed is tainted with mala fides and is not allowed. Put differently, consent to withdraw the case against the 5th and 7th Accused is declined.”

4. It is this decision that has triggered the Revision application that I am called upon to determine.
Background.

The Director of Public Prosecutions made the decision to charge the following persons jointly:-

Edward Kiptoo----- 1st Accused

Stephen Maina Gatira ----- 2nd Accused

Samuel Patrick Njue ----- 3rd Accused

Eliud Kipchoge Chepkwony----- 4th Accused

Biniface K. Lurare ----- 5th Accused

Jane Nasimiyu Muse ----- 6th Accused

Simon Karanja Maina ----- 7th Accused

5. The Charge Sheet presented to court on 7th April 2022 has in the 1st count 7 Accused persons.

6. The 5th Respondent Bonface Lurare and Simon Karanja Maina were charged with 3 counts each.

7. The two respondents have since the commencement of the matter never appeared in court for the taking of plea thus causing a delay in the prosecution of the matter.

8. The DPP owing to the absence of the respondents elected to amend the charge in order to remove the names of two accused from the proceedings so as for the matter to proceed smoothly to its logical conclusion

9. The prosecution through Mr. Murage on the 11th September 2024 sought to introduce the amendment.

10. Counsel for the prosecution filed and served an affidavit explaining his reasons for the intended amendment.

11. MR. Katwa Kigen who appeared for the 1st and 4th respondents sought to reply to the affidavit opposing the move by the DPP.

12. MR. Waswa who also appeared for the 6th respondent indicated that he was not opposed to the intended amendment.

Analysis And Determination

13. On the 7th October 2024 when the application came up for hearing before the learned Honorable magistrate MR. MURAGE informed the court that he was seeking to have the charge amended to remove the names of the 5th and 7th respondent from the record for the reason that the two accused persons had never turned up for trial thus the prosecution of the rest of the accused persons was being unnecessarily delayed.



14. The application was expressed to be anchored on the provisions of Section 214 of the Criminal Procedure Code as read together with Article 157 of *the Constitution*.
15. MR. MURAGE further placed reliance on Section 87 (a) of the Criminal Procedure Code urging that the effect of the amendment would be to drop the charges against the two accused thus his plea to have the court apply Section 87(a) of the Criminal Procedure Code as well.
16. MR. WASWA Advocate did not oppose the Director of Public Prosecution's application because in his view the delay in arresting the 5th and 7th respondent was actually prejudicial to the rest of the Accused.
17. According to MR. WASWA the delay in arresting the two was occasioning delay in the conclusion of the matter.
18. The affidavit by the Investigating Officer explained the efforts made by the investigators to try and arrest the 5th and 7th respondent. The investigating officer explained to the court that he has been unable to trace the two accused persons.
19. Mr. Katwa on his part opposed the application mainly contending that the amendment sought would result in the withdrawal of charges thus in his view that would be prejudicial to the rest of the accused. He also argued that the withdrawal would amount to discrimination as against the rest of the accused persons.
20. He went further to submit that the 4th Accused had all along attended court thus the withdrawal sought was being done in bad faith.
21. MR. Karwa did not however state how a withdrawal of charges against the 5th and 7th respondents would prejudice the co-accused.
22. Counsel did not also substantiate in what sense the application was being brought in bad faith given the reason provided by the prosecution.
23. Mr. Katwa further submitted that there was more than meets the eye in the making of the application for amendment and the action by the prosecution amounted to abuse of prosecutorial powers.
24. Counsel went further to submit that the withdrawal would amount to discrimination against the rest of the accused since all names were in the same title.
25. MR. Katwa ended by submitting that:

“DPP has powers to amend but it must be within the law and if the intention is to withdraw then it should not be a discharge. The prosecution powers should not be misused.”
26. In response Mr. Murage contended before the trial magistrate that even though Mr. Katwa had insisted on a formal application to be filed, there are no hard rules relating to it and that the same can be done orally.
27. Mr. Murage insisted that he had made an application to withdraw under Section 87 (a) of the Criminal Procedure Code against the 5th and 7th Accused in keeping with custom and practice in making such applications.
28. Counsel for the prosecution further submitted that the application was brought in good faith and that the 7th accused could not be traced.



29. Counsel reiterated the powers of the Director of Public Prosecutions under Article 157 of *the Constitution* to withdraw cases.
30. The foregoing is an abridged version of what transpired before the learned Honorable magistrate.

Power Of The Director Of Public Prosecutions In Commencement And Termination Of Criminal Cases

31. The revision basically seeks to have this court exercise its revisionary powers and revise the learned Honorable magistrate's decision on account of it being incorrect, illegal, improper and or irregular.
32. The revision seeks to have the court determine the powers of the DPP in the regard to the control of prosecutions vis a vis the courts power in granting leave to withdraw a criminal case under Article 157(8) of *the Constitution*.
33. The applicant contends that in declining the application to amend and withdraw the learned honorable magistrate unfairly fettered the discretion of the DPP thus the court's decision infringed on the Constitutional and statutory power of the DPP to regulate and control prosecutions.
34. Mr. Owiti Principal Prosecution counsel argued that under Article 157 (6) of *the Constitution* the Director of Public Prosecution has the Constitutional authority to terminate the prosecution of any matter with the leave of court. The prosecution contended that in considering such applications the court is enjoined to consider the reasons advanced by the DPP and not to unreasonably withhold such consent.
35. Counsel for the Director of Public Prosecutions argued that the application by the DPP seeking to amend the charge and withdrawal the case against the 5th and 7th respondents was made in good faith and that sufficient grounds were laid before the court to justify the intended withdrawal.
36. Mr. Owiti argued that the affidavit of the Investigating officer demonstrated the efforts that the police had put in trying to arrest the two respondents thus the honorable magistrate ought to have considered whether the application was merited on the basis of the reasons advanced.
37. According to counsel the decision of the Learned Honorable was not anchored on any factual or legal basis and that the court did not exercise its discretion judiciously.
38. Counsel argued that the effect of the learned Honorable Magistrate's decision would be that the prosecution of the rest of the accused is to be held in abeyance indefinitely to await the arrest and arraignment of the 5th and 7th accused persons.
39. However, counsel posited that the DPP did not wish to have the matter delayed any further thus the application for amendment and withdrawal. The DPP was emphatic that should the decision of the learned honorable magistrate be allowed to stand the trial would never see the light of day.
40. Counsel cited Article 50 of *the Constitution* and emphasized on the need for expedited trials.
41. The prosecution also took issue with the learned Honorable magistrate attempt to interpret *the Constitution*. Counsel argued that Article 165 (3) of *the Constitution* and the provisions of Section 8 of the Magistrate's Courts Act are clear with regard to the power to interpret *the Constitution* by magistrates.
42. Counsel for the prosecution urged that the power of the magistrate is limited to the interpretation of the rights under Article 25 (a) and (b).



43. It does therefore follow, in the opinion of counsel for the prosecution, that the magistrate in attempting to interpret Article 27 of *the Constitution*, the magistrate did so without the necessary jurisdiction.
44. Counsel pleaded with this court to reject the arguments by the defense through Ms Waweru that any withdrawal or termination of charges against the 5th and 7th Accused would amount to a violation of Article 27 of *the Constitution*.
45. Counsel further urged that the dismissal of the prosecution's application by the Magistrate was incorrect, illegal and irregular thus this court should be minded to quash the same. According to the prosecution, the DPP had fully explained his reasons for seeking the withdrawal thus those reasons ought to have been considered and leave granted.
46. In the prosecution's view the affidavit by the prosecution was improperly disregarded thus resulting into a miscarriage of justice.
47. The prosecution further contended that the learned Honorable magistrate did not address his mind to the reasons advanced by the prosecution thus arriving at a wrong decision in law.
48. The prosecution went on to submit that where the investigator has indicated to the court that he is unable to trace the accused person whom he intends to withdraw the charges against, the court should ordinarily grant leave to withdraw under Article 157 (6) (C) as read together with Article 157(8) of *the Constitution*.
49. The prosecution ended by submitting that the rejection of the application was illegal, improper and incorrect thus the power of this court under Section 362, and 364 of the Criminal Procedure Code should come to the aid of the DPP.
50. The 2nd respondent appeared in person and when his turn to address the court came, he told this court that he was only interested in having the case heard and determined and any delay in concluding the matter was greatly prejudicial to him. He urged the court to look into the justice of the matter.
51. The 3rd respondent similarly told the court that he was interested in having the matter expeditiously concluded for it had been delayed unreasonably.
52. MR. Oringe counsel for the 5th and 6th respondent did not oppose the application by the Director of Public Prosecutions. He expressly submitted that he fully supported the DPP's move and he was quick to associate himself with the submissions by counsel for the DPP.
53. Ms.Waweru appeared holding brief for Mr.Katwa Kigen Advocate for the 1st and 4th respondent. Counsel urged the court to reject the application and order that the matter proceeds as directed by the Honorable magistrate.
54. Ms.Waweru relied on an affidavit sworn by Eliud Chepkwony the 4th respondent on the 12th November 2024.
55. The deponent in his affidavit avers that the applicant should have preferred and appeal rather than a revision against the decision of the learned Honorable magistrate.
56. He goes further to state that the applicant is seeking to challenge the merits of the decision of the learned Honorable magistrate which is not tenable in a revision.
57. According to Ms. Waweru all that the prosecution is trying to do by amending the charge is to withdraw the case against the 5th and 7th respondents to try and shield the two from prosecution.



58. Further, the 1st and 4th respondents contend that the reasons advanced by the prosecution for the intended withdrawal are inadequate.
59. It is the position of the 1st and 4th respondent that the learned Honorable magistrate was correct in his decision rejecting the application
60. Ms. Waweru further argued that the application under Section 214 of the Criminal Procedure Code is a camouflaged withdrawal under Section 87 (a) of the Criminal Procedure Code thus the same should and ought to have been rejected.
61. In the counsel's view, the trial court was right in rejecting the application and this court should not be inclined to interfere with the trial courts decision.
62. Ms. Waweru went further to submit that in an application under Section 214 of the Criminal Procedure Code you can only seek to deal with inaccuracies and deficiencies in a Charge Sheet.
63. The 1st and 4th respondents maintain that if per chance the name of an accused person is erroneously included in a charge sheet that can only be cured through a withdrawal under Section 87 (a) of the Criminal Procedure Code but not through an amendment.
64. It was further argued for the 1st and 4th respondent that the DPP's attempt to amend the charge should be rejected for there were no proper reasons advanced by the state.
65. The two respondents contend that the intended move would amount to selective prosecution.
66. Further, counsel for the 1st and 4th respondent contended that the state had not demonstrated the efforts made to arrest and arraign the two respondents.
67. Ms. Waweru urged this court to find that the investigating officer ought to have provided evidence to show that he has tried tracking the two respondents to no avail.
68. Counsel cited several decisions in support of her clients' position and urged the court to consider them in determining the matter.
69. The authorities cited by counsel for the 1st and 4th respondent included:-
 - I. R Vs. Kennedy Sembe and 3 others 2019 eKLR
 - II. Ann Wanja Vs. Republic 2022 eKLRMs. Waweru submitted that the DPP should use his powers in the public interest and avoid using courts to clean his dirty work.
70. In a brief rejoinder, counsel for the DPP urged the court to find that the 1st and 4th respondents' objection to the revision application was without merit.
71. The 1st and 4th respondent according to counsel do not stand to suffer any prejudice should the revision application be granted.
72. The position by the Director of Public Prosecution is that the application was presented with the necessary facts being placed before the court and that the learned Honorable magistrate knew without doubt that the DPP was seeking to have the matter withdrawn as against the 5th and 7th respondents.
73. The Director of Public Prosecution's team further urged that under Sections 362 ,363, and Section 364 of the Criminal Procedure Code a party can challenge the legality of a decision and that could as well extent to the merits of a decision.



Determination

The application brings to the fore one of the most robust discussions in our courts today about the exercise of power by independent office holders under *the Constitution* of Kenya.

70. The Director of Public Prosecutions is the officer in law mandated to initiate Criminal Prosecutions in Kenya under Article 157 of *the Constitution*. He enjoys that exclusive authority until parliament otherwise decides in line with Article 157 (12) of *the Constitution*.
71. The creation of the Independent Director of Public Prosecutions was not by accident by the framers of our Constitution.
72. Kenya was emerging from a one -party dictatorship under which the violation of human rights through politically engineered prosecutions was prevalent. Kenyans will recall with nostalgia the harrowing tales of the Nyayo torture chambers by those who survived to tell their story.
73. The framers of our Constitution through a deliberate act after wide consultations created the independent office of the DPP who would not sit as a member of the cabinet or parliament in order to cushion the holder thereof from political interferences in the making of the decision to prosecute.
74. In exercising that power, the DPP under Article 157(10) of *the Constitution* is not subject to the direction or control of any -body or authority not even the courts.
75. However, the courts in appropriate cases can intervene to check the excesses of the DPP once an aggrieved party presents a case demonstrating such abuse. See Ngome vs DPP and Another; Ethics and Anti-Corruption Commission (2024) eKLR.
76. The Director of Public Prosecutions is expected to make independent decisions about who is to be prosecuted and for what offence and in the making of that decision to act within the law.
77. In the exercise of that power the Director of Public Prosecutions must avoid the abuse of the Criminal Justice process and protect the public interest.
78. The Director of Public Prosecutions is also obliged to ensure that the interests of justice are not compromised in the course of a prosecution.
79. It is important to note that where a prosecution is unreasonably delayed the interests of justice are compromised and it is incumbent upon the DPP under Article 157(11) to ensure that remedial action is taken where necessary, such remedial action could include the withdrawal of a prosecution.
80. The court on the other hand must rise to the occasion and enforce the provisions of Article 159 of *the Constitution* by ensuring that justice is not delayed and is served upon all parties irrespective of their status in society.
81. It is the view of this court that the trial court handling a matter in which the DPP seeks to withdraw criminal charges, against persons who have never taken plea, should not withhold consent to withdraw in exercise of its power under Article 157(8) more so where there are other accused persons whose trial cannot proceed because of the delay in arresting their co accused.
82. The refusal to grant leave to the DPP to withdraw would in essence be a violation of Article 50 on the right to a fair trial more so where the accused persons already in court have got nothing to do with the delay in arraignment of the co accused.



83. The decision to prosecute is one which has the capacity to change radically the life of an individual. It must be exercised only when Director of Public Prosecutions or his representative is certain that the matter that he seeks to prosecute satisfies the evidential and public interest test.
84. No man should be put on trial without evidence to support the charges. The rigors of a trial have very disastrous effect in ones' career or reputation. For that reason, only cases where the DPP has a realistic prospect of securing a conviction should be allowed to proceed to trial
85. In *Mohit Vs The Director of Public Prosecutions of Mauritius (Mauritius)* [2006] UKPC 20 (24 April 2006) the privy council in determining whether a decision by the Director of Public Prosecutions of Mauritius to discontinue a private prosecution is susceptible to review by the courts had this to say:-
- ‘...It may be accepted, however, that a purported exercise of power would be reviewable if it were made:
- i. In excess of the DPP’s constitutional or statutory grants of power— such as an attempt to institute proceedings in a court established by a disciplinary law (see s 96(4)(a).
 - ii. When, contrary to the provisions of *the Constitution*, the DPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or her own independent discretion— if the DPP were to act upon a political instruction the decision could be amenable to review.
 - iii. In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of the payment of a bribe.
 - iv. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.
 - v. Where the DPP has fettered his or her discretion by a rigid policy— eg one that precludes prosecution of a specific class of offences.
86. The decision emphasizes the need for the court to exercise caution whenever it is called upon to exercise oversight over the DPP’s decision to prosecute or not to prosecute. See *Diamond Hassham Lalji and Another Vs A.G and 4 Others* 2014 eKLR
87. It is not open for a court of law to review the decision of the DPP without proof of any of the grounds set out in the *Mohit* case (supra) being established because that has the danger of encroaching on the decisional independence of the DPP contrary to the express provisions of Article 157 (10) of *the Constitution*.
88. In determining the propriety, legality or correctness of the learned Honorable magistrate’s decision this court must address itself to the question; what is expected of the DPP under Article 157 (6) (c) and 157(8) of *the Constitution* whenever the DPP applies for leave to discontinue a criminal prosecution.
89. Article 157 of *the Constitution* of Kenya provides:-
- (1) There is established the office of Director of Public Prosecutions.
 - (2) The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President.



- (3) The qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a judge of the High Court.
 - (4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.
 - (5) The Director of Public Prosecutions shall hold office for a term of eight years and shall not be eligible for re-appointment.
 - (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
 - (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
 - (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
 - (c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
 - (7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution’s case, the defendant shall be acquitted.
 - (8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.
 - (9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.
 - (10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
 - (11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.
 - (12) Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.
86. The Director of the Public Prosecutions is required to provide reasons to the court whenever he seeks to discontinue a matter and the duty of the court is to examine the reasons provided before deciding whether or not to grant leave to withdraw. See *Republic Vs C.M Milimani Criminal Division, DPP, DCI, Migwi Macharia Ex. Parte John Wachira Wambugu and Another (Misc. Application 620 of 2017) 2018 KEHC 9456 (KLR)*
87. In the instant case the DPP by way of an affidavit sworn by James Murage prosecution counsel on the 30th of September 2024 explained in great detail the reasons behind the intended withdrawal of the charges against the 5th and 7th accused persons.



88. At paragraph 7 of Mr. Murage’s affidavit, the Director of Public Prosecutions states:-

“That in the circumstances, it is prudent in the interest of justice and in order not to delay the hearing of the matter any further, to withdraw the charges against the 5th and 7th accused persons whose conduct has made it impossible to have the trial begin and conclude without unreasonable delay as well as for them to be present during the trial without delaying the other accused persons who are present.”

86. The DPP quite clearly made known the reason for seeking to withdraw the matter.

87. The learned Honorable magistrate in his ruling considered the question of delay but did not expressly address his mind to the prejudice that a delayed prosecution would occasion the other accused persons who have already taken plea and have been waiting for the arrest and arraignment of the 5th and 7th accused persons since the 7th of April 2022 when the charge was received and duly filed in court. The failure to do so flies in the face of the express provisions of Article 159 on the duty of the court to ensure justice is expeditiously dispensed and that there is equal treatment of parties in a trial.

88. Further, the Honorable magistrate’s ruling captures the explanation provided by the Investigating Officer regarding his effort in trying to arrest and arraign the 5th and 7th accused persons but the learned Honorable magistrate does not give any reason for disregarding the explanation given by the investigating officer.

89. The failure by the court to give reasons for rejecting the explanation by the investigating officer and the DPP raises the question of propriety and correctness of the ruling thus bringing it within the scope of the revisionary jurisdiction of this court under Sections 362,362 and 364 of the Criminal Procedure Code

90. The contention by counsel for the 1st and 4th respondents that the DPP has improperly invoked the jurisdiction of this court is therefore without merit.

91. A court of law cannot simply decline an application without providing reasons for such a decision. If indeed the trial court had given reasons for declining to accept the reasons advanced by the DPP then the issue as to whether the proper cause would have been an appeal or a revision would have been merited.

92. However, as I have stated, the ruling is silent as to why the magistrate thinks that the delay of a trial for close to two years is not sufficient reason for the DPP to drop charges against those persons that the police have been unable to arrest.

93. The Supreme Court of India in *Abdul Karim v. State of Karnataka and others*, JT 2000 (Suppl.) 2 SC 363 : 2000 (8) SCC 710 : AIR 2001 SC 116., held relying upon its earlier judgment in *Sheo Nandan Paswan v. State of Bihar*, that what the Court has to see is whether the application is made in good faith in the interest of public policy and justice and not to thwart or stifle the process of law and that the Court after considering the facts of the case has to see whether the application suffers from such improprieties or illegalities as would cause manifest injustice if consent was given and that when the Public Prosecutor makes an application for withdrawal after taking into consideration of the material before him the Court must exercise its judicial discretion by considering such material and on such consideration must either give consent or decline.

94. The considerations set out above must be brought out by the party challenging the DPP’s decision to withdraw.



95. The learned Honorable magistrate stated that the application for withdrawal under Section 87 (a) of the Criminal Procedure Code was tainted with mala fides and proceeded to dismiss the same.
96. Clearly, the decision by the magistrate was informed by what he considered an unfair dropping of charges against the two respondents by the DPP.
97. However, it is not clear why the court reached the finding that the decision was actuated by bad faith on the part of the DPP whereas an explanation had been given as to why the intended withdrawal was initiated. There was no evidence of malice on the part of the DPP presented by the 1st and 4th respondents who resisted the application.
98. The decision by the learned honorable magistrate was therefore made on the basis of conjecture.
99. This court has must then deal with another important question; what should be the considerations to be made by a public prosecutor in determining whether or not to discontinue a prosecution?
100. For purposes of guiding public prosecutors in exercising the discretion to discontinue a prosecution, the Public Prosecutor has to observe the following that:-
 - I. Although the initiative emanates from the State, the Public Prosecutor who is in charge of the case shall act independently and shall not surrender his discretion to someone else.
 - II. The Public Prosecutor should apply his mind to the relevant materials made available to him and should satisfy himself that the facts warrant the exercise of his discretion to discontinue the prosecution.
 - III. The Public Prosecutor should act fairly uninfluenced by any irrelevant and extraneous considerations, and in good faith in the interest of public policy and justice but not to thwart or stifle the process of law.
 - IV. The Public Prosecutor must aver in his application that he is acting in good faith satisfied on consideration of all relevant material that his withdrawal from the prosecution is in the public interest and it will not stifle or thwart the process of law or cause injustice, and state briefly in the application or in an affidavit annexed to that application that the material has been considered for withdrawal.

The considerations above if well taken into consideration by public prosecutors would bring about predictability and consistency in prosecutorial decision making to avoid to demystify the question of withdrawal of cases in Kenya.

101. On the other hand, the trial courts should be guided by the following considerations in determining an application for withdrawal by the public prosecutor
 - a. The opinion of the Court is no doubt supervisory but it should satisfy that the material perused by the Public Prosecutor should reasonably lead to the conclusion that the withdrawal of the Public Prosecutor will serve the public interest.
 - b. In the process, the Court is not reappreciating the grounds, which led the Public Prosecutor to file an application for withdrawal.
 - c. Both the Court as well as the Public Prosecutor are duty bound to protect the administration of criminal justice against the possible abuse or misuse of law by the executive.



- d. The Court cannot lightly interfere with the judgment of the Public Prosecutor unless it comes to the conclusion that he has not applied his mind as a free agent uninfluenced by irrelevant and extraneous considerations or that his decision is not bona fide.
- e. It is not for the Court to assess the evidence to discover whether the case would end in conviction or acquittal. All that the Court has to see is whether the application is made in good faith in the interest of public policy and justice and not to thwart or stifle the process of law.
- f. The Court has to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes.
- g. The consent shall not be given lightly on the mere application of the Public Prosecutor without careful and proper scrutiny of the grounds on which the application for consent is made.

See Public Interest Litigation by Justice P.S Narayana Former Judge, High Court of Andhra Pradesh and P. Jagadish Chandra Prasad ,Advocate , High Court of Andhra Pradesh and High Court of Telangana, Foreword Hon'ble Dr. Justice Motilal B. Naik Judge, High Court of Andhra Pradesh (6th Edition) Page [327 and 328]

- 102. The considerations set out above if observed by the prosecutor as well as the trial court it should not be a herculean task for the court to make a just determination as to whether an application for withdrawal of charges should be granted.
- 103. This court has independently reviewed the record of the lower court and it does appear that the 5th and 7th accused persons have never taken plea and therefore if the decision by the learned Honorable magistrate is allowed to stand, no doubt the trial as against the rest of the accused persons is unlikely to commence any time soon.
- 104. It is the considered view of this court that that would be a great travesty of justice against the 2nd, 3rd and 6th respondents who are not opposed to the withdrawal.
- 105. To countenance the delay, that would be tantamount to abdication of judicial duty by the court. The court should stand as the guardian of the rights of all accused persons and avoid being drawn into the arena of litigation by parties who may disinterested in the matter proceeding to its logical conclusions. That sadly appears to be the desire of the 1st and 4th respondents.
- 106. It is evident from the submissions of Ms.Waweru for the 1st and 4th respondents that the two accused persons are not bothered by the delay.
- 107. On the other hand, the 2nd and 3rd respondents have expressed their dissatisfaction with the delay.
- 108. It should therefore be clear that there is a clash of interests between the DPP, the 2nd and 3rd respondents who are keen on having the matter heard expeditiously and on the other hand the 1st and 4th respondents who do not mind the continued delay.
- 109. The trial court faced with that reality ought to have struck a balance in the interests of the administration of justice and allowed the withdrawal of the case against the 5th and 7th respondents as per the application by the DPP.
- 110. Needless to say, to insist that the two accused persons remain in the Charge sheet, is akin to directing the DPP to continue prosecuting them their absence notwithstanding which in the view of this court is a blatant violation of the expression provisions of Article 157 (10) of *the Constitution*.



111. It should be noted that an accused person has no duty to assist the prosecution to prosecute his co-accused and that the responsibility of prosecution is independent and cannot be transferred or shared with a co-accused. See R. Vs. Sturmer 1975 QB 834.
112. The insistence by the 1st and 4th respondents that the 5th and 7th respondents must be prosecuted is untenable since criminal responsibility is individual and the duty of an accused person in a criminal trial is simply to answer the case against them. See R. Vs. Gokah [2006] EWCA Crim 2112
113. In the end, this court finds that the decision by the learned Honorable magistrate declining the request for amendment under Section 214 of the Criminal Procedure Code and withdrawal under Section 87 (a) of the Criminal Procedure Code was improper, incorrect and irregular to the extent that the court failed to give reasons for rejecting the reasons advanced by the investigator and the DPP in regard to the efforts made in an attempt to bring the 5th and 7th accused persons to justice.
114. The ruling of the learned Honorable magistrate delivered on 16th October 2024 is hereby held to be incorrect, irregular and improper in law and therefore quashed and set aside in its entirety.
115. As a result, this court directs that in the interest of justice the DPP proceeds to substitute the charge and proceed with the case against the accused persons currently before court to avoid further violation of the right to a fair trial under Article 50 of *the Constitution* in respect of the accused persons before court. Nothing stops the DPP from pursuing the 5th and 7th respondents as and when they are traced to answer to the charges that he may wish to prefer against them.
116. It is the view of this court that such action would not be discriminatory and would further the interests of justice.
117. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF DECEMBER 2024.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Ms Njoroge h/b for Owiti for the Applicant

2nd Respondent Absent

3rd Respondent Absent

Waswa for the 4th Respondent

