



**Mwai v DPP; JNM (Interested Party) (Miscellaneous Criminal Application  
31 of 2022) [2023] KEHC 3021 (KLR) (30 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3021 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
MISCELLANEOUS CRIMINAL APPLICATION 31 OF 2022  
RM MWONGO, J  
MARCH 30, 2023**

**BETWEEN**

**CHARLES MUTHII MWAI ..... APPLICANT**

**AND**

**DPP ..... RESPONDENT**

**AND**

**JNM ..... INTERESTED PARTY**

**RULING**

**Background**

1. The applicant is charged in the lower court with the defilement of a 17-year-old minor, under Section 8(1) and (3) of the *Sexual Offences Act*. In the proceedings there, the state closed its case – including the testimony of the minor – and parties filed submissions on whether there is a case to answer. The court placed the accused on his defence.
2. Soon thereafter, the prosecution counsel informed the trial court that she had received a notice of intended withdrawal of the complainant. She said she needed to consider the request, before deciding on the matter.
3. Eventually, the DPP through a letter dated 20<sup>th</sup> September, 2022, declined the attempt to withdraw the criminal case and decided that the matter should proceed in the best interests of the child.
4. Dissatisfied with the DPP's position, the applicant and complainant filed this motion pursuant to Articles 159(2)(c), 165 (3) (a) (d) (iii), and 259(1) of the *Constitution*, and sections 204, 362 and 364 (1) (b) of the *Criminal Procedure Code*. He seeks the following orders:
  - i. Spent



- ii. Spent
  - iii. The Honourable court be pleased to review the prosecution decision denying the complainant's request for the withdrawal of the complainant in Criminal S.O 11 of 2021.
  - iv. The Honourable court be pleased to declare the charges against the Applicant in Kerugoya Criminal S.O No 11 of 2021 as withdrawn.
  - v. That the Honourable court be pleased to grant the request of the complainant of withdrawal of their case against the accused person vide the letter addressed to the prosecution dated 7th September 2022.
5. In his grounds for the application the applicant states that: he and the complainant have deliberated the matter and resolved to end the dispute against the accused person; that in the spirit of resolving the dispute out of court, the complainant has withdrawn their case against the accused; That the complainant out of her own volition wrote to the prosecution vide the letter addressed to the prosecution dated 7<sup>th</sup> September, 2022 withdrawing her complaint against the accused person; that notwithstanding the agreement the DPP in their letter addressed to court dated 20<sup>th</sup> September 2022 advised the court that the matter to proceed in court to full completion; and that the complainant and her family and the accused have reconciled their mind and felt that in their interest of justice the matter be settled to the best interest of the complainant and the community.
  6. Further the applicant states that he has been incarcerated at Kerugoya Prison since 8<sup>th</sup> March 2021 until 27<sup>th</sup> September 2022 when he was able to post bond. He says he has suffered enough punishment and mental anguish due to this matter; and that the complainant and her family and himself have reconciled their mind and felt that in their interest of justice, the matter he settled to the best interest of the complainant and the community.
  7. Following the application in this court, the Court stayed the lower court proceedings pending determination of this application.
  8. Parties filed written submissions.

### **Applicant's Submissions**

9. The applicant's submissions were two pronged: That the best interests of the child is not a one sided concept; that there is varied interest within it, including the voice of the victim and her relatives, the prosecution decision of having the suit heard to its conclusion on grounds of public interest is not objective. Public interest is a concept which must be demonstrated. It has not demonstrated how the community interests it seeks to protect overrides the victims' interests, her relatives interest, the accused person's relatives' interests and Accused person interest.
10. The second prong is whether the best interests of the child and public interest are justifiable reasons to decline withdrawal. The applicant argues that the criminal charge against the accused is a personal crime, and as such, being a crime against the victim, the voice of the victim must be seriously taken into consideration. The victim is now an adult of above 18 years, she is able to comprehend and appreciate her decision. She has had time to deliberate on what is her best interest and to carefully consider the consequence of the withdrawal before submitting her withdrawal letter to the respondent. Further, it is not in dispute that the victim and her family have reconciled with the accused person and his family.
11. The applicant submits that the law is clear that under Article 159 (2) (c) of the constitution traditional reconciliation is encouraged. Article 159 (1) of the constitution allows the courts and tribunals



to be guided by alternative dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism. The same goes for public institutions which ought to encourage alternative dispute resolution

12. Section 204 of the [CPC](#) permits a complainant to withdraw the complaint before the court makes a final order in the matter. In the matter of [Republic v P.K.M](#) (2017) eKLR the court, on disallowing an application for revision by the DPP from a ruling allowing criminal charges for threats to kill and creating disturbance made the following observation:

“ ... in my view thereof, if this application was allowed, the court would vitiate the process of promoting reconciliation which has already taken effect in any event. ”

13. In the case of [Dennis Wanjohi Kagiri v Republic](#) (2016) eKLR where the accused had been charged with robbery with violence, Judge Kimaru factored in the willingness of the complainant to withdraw the complaint and acquitted the accused person.

### **Respondent’s Submissions**

14. The prosecution also argued under two prongs: Whether the complainant and the accused can decide to withdraw defilement charges; and Whether the Application is made in good faith and without malice
15. On the first prong the prosecution submits that in cases under the [Sexual Offences Act](#) can only be withdrawn by the DPP under Section 40 of the [Sexual Offences Act](#) and not the victim under section 204 of the [Criminal Procedure Code](#).
16. Further that the DPP is deeply concern from a point of multiple vulnerability to the victim due to the effect of the violation that includes psychological and/or physical trauma, self and societal stigma, fear of re-victimization and possible pressure from the perpetrator, mistrust of people and systems, security concerns when dealing with cases of defilement hence justice should be availed to all without discrimination.
17. He also submits that the [Sexual offences Act](#) No 3 of 2006 was enacted to deal with the menace of sexual offences including defilement. The nature of sexual offences depicts moral debauchery; a cruel attack on a person’s dignity and persons; and, an indelible corrosive hurt of the victim’s life.
18. On the second prong, the prosecution submits that Section 137N [Criminal Procedure Code](#) envisages exclusion of the withdrawal of sexual offences from any form of amicable settlement including Alternative Dispute Resolutions (ADR) and Plea Bargain and Agreement.

The section 137N of the [CPC](#) states:

“ This Part shall not apply to-

- a. Offences under the Sexual Offences Act 2006;

### **Issues for Determination**

19. The issue for determination is whether the complainant’s request for the withdrawal of the defilement complainant should be allowed.



## Analysis and Determination

20. It is not in dispute that the Applicant is charged with the offence of defilement contrary to Section 8(1) (2) of the [Sexual Offences Act](#) in Criminal Case No 11 of 2021 before the Chief Magistrates Court at Kerugoya. It is not in dispute that the victim, as complainant, wrote to the prosecution withdrawing her complaint against the accused person.
21. The letter of withdrawal is annexed to the supporting affidavit of the applicant exhibited in the High Court. It is further not in dispute that the State through a letter dated 20<sup>th</sup> September 2022 wrote to the Chief Magistrate's Court at Kerugoya indicating its intention to proceed with the matter to its logical conclusion as the complainant in the matter is a minor who has already testified. That the State takes the position that it has a keen interest in offences of defilement and put the best interest of the child first before anything else.
22. The letter withdrawing the complaint is dated 7<sup>th</sup> September, 2022, written by JNM, the victim/complainant in the case, and is as follows:

“I am the complainant in this case. The accused one Charles Muthii Mwai was arrested and charged with a sexual offence vide Kerugoya CM’s court SO No 11 of 2021.

That I now want to withdraw my complaints against the accused person and that I will never lodge any complaints against him....”
23. Finally, it is not disputed that the court fixed the matter for defence hearing on 25<sup>th</sup> October 2022. The same has been stayed pending the hearing and determination of this application.

## Whether the complainant and the accused can unilaterally decide to withdraw a defilement complaint

24. As already noted, the applicant's case is founded on Section 204 of the [CPC](#) which permits a complainant to withdraw the complaint before the court makes a final order in the matter. Additionally, the applicant relies on Article 159 (2) (c) of the [Constitution](#) under which alternative dispute resolution is encouraged. He also relies on the observation of Kimaru J (as he then was) in the matter of [Republic v P.K.M](#) (2017) eKLR that if the application before him was disallowed the court would vitiate the process of promoting reconciliation which has already taken effect in any event.
25. Section 204 of the [CPC](#) gives the court discretion to allow withdrawal of a complaint. The section provides:

“If a complainant at any time before a final order is passed in a case under this Part, satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused” (emphasis added).
26. On the other hand, Section 40 of the [Sexual Offences Act](#) provides that:

“The decision as to whether the prosecution or investigation by any police officer of a complaint that a sexual offence has been committed should be discontinued shall rest with the Attorney General.”(emphasis added).



## The reference to AG should be read to mean the DPP

27. It is clear that section 204 enables a complainant to withdraw a complaint. To succeed in such withdrawal, two conditions must be met for the court to exercise its discretion: First, the request to withdraw must be made before a final order is passed in a case. In this case, the applicant has complied with that part of the provision, as no final order has been made. The second condition the complainant must meet is to satisfy the court that there are sufficient grounds to withdraw. In this case, the letter of withdrawal, as worded, sets out no grounds for withdrawal. It is a bare letter of withdrawal with no grounds set out. To that extent, in the absence of grounds for withdrawal, the court cannot exercise its discretion.
28. The prosecution submits that cases under the *Sexual Offences Act* can only be withdrawn by the DPP in terms of Section 40 of the *Sexual Offences Act* and not the victim under section 204 of the *Criminal Procedure Code*.
29. As concerns these two sections, this court (Gikonyo J) in the case of *Republic v Jeremiah Koilel* [2021] eKLR held as follows:

“In the upshot, I am of the considered view that, although section 204 does not provide for an express exclusion of sexual offences from withdrawal under the section, I believe transitional clause 2 in the First Schedule to the *Sexual Offences Act* sets section 40 of the *Sexual Offences Act* above the general provision in section 204 of the CPC. In any event, the rule on construction of statutes would demand that a later enactment supersedes. Section 40 places the power to determine whether to prosecute a complaint on sexual offence in the DPP. Nonetheless, section 40 is quite untidy and should be aligned with article 157 of the *Constitution*. Subtle suggestion; legislative intervention may be necessary to expressly provide for exclusion of sexual offences from application of section 204 of the CPC. Needless to state that, a health state of statute law aids administration of justice.”

30. This court is aware of the case of *Republic v Malek Abdulla Mohamed* [1979] eKLR where section 204 was discussed as follows by Cotran, J:

“On the other hand, I fully agree with ground (2) of appeal because section 204 in terms contemplates (1) an application by the complainant to withdraw under that section, and (2) satisfaction by the Court that there are sufficient grounds for permitting such a withdrawal. In this case the prosecution neither applied for nor gave reasons for withdrawal under section 204.

I would therefore allow this appeal to the extent that I set aside the order and consequential acquittal of the respondent under section 204 of the Criminal Procedure Code. The effect of this is that the prosecution may, if they so desire, continue with the proceedings against the respondent upon the same charge.”

31. The prosecution further pointed out that Section 137N of the *Criminal Procedure Code* envisages exclusion of sexual offences from any form of amicable settlement including Arbitration Dispute Resolutions (ADR) and Plea Bargain Agreement. Section 137N of the *CPC* provides as follows:

“This Part shall not apply to-

- a. Offences under the Sexual Offences Act 2006”



32. The respondent submits that the Sexual Offences Act No 3 of 2006 was enacted to deal with the menace of sexual offences including defilement. The nature of sexual offences depicts moral debauchery; a cruel attack on a person’s dignity and person; and, an indelible corrosive hurt upon the victim’s life.
33. The proper starting point in my view is the Constitution. Article 157(6) vests state powers of prosecution on the DPP. The powers include power to institute and undertake criminal proceedings; power to take over and continue any criminal proceedings; and, subject to the court’s concurrence, the power to discontinue any proceedings.
34. The constitutional powers of the DPP are replicated in Section 5 of the ODPP Act No 2 of 2013 as follows:
1. Pursuant to Article 157 of the Constitution the Director shall –
    - a. ....
    - b. exercise state powers of prosecution and may:
      - i. 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;
      - ii. 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; and
      - iii. subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions.
35. Article 159 of the Constitution was relied upon by the applicant as entitling him to enter into alternative dispute resolutions mechanisms to withdraw the complaint as amicable settlement had been achieved. Article 159(2)(c) provides as follows:
- “In exercising judicial authority, the courts and tribunals shall be guided by the following principles –
- .....
- (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution shall be promoted subject to clause (3)”
36. I do not read this provision of Article 159 as entitling a party to withdraw a criminal complaint. That provision constitutes the peoples’ injunction directed to the Judiciary that when the Judiciary is exercising its judicial authority, it must endeavour to promote the use of alternative dispute resolution mechanisms. It does not create a right of a complainant to withdraw a case by amicable settlement procedures. It promotes the exercise of the court’s discretion by urging the court to consider alternative dispute resolution mechanisms.



37. There are decisions of this court that have encouraged ADR. Muriithi J, discussed these briefly in [Kelly Kases Bunjika v Director of Public Prosecutions \(DPP\) & another](#) [2018] eKLR stating as follows:

“The court is aware of the persuasive High High Court decisions in *R v. Abdow Mohamed* (R. Korir, J.) and *R v. Juliana Mwikali Kiteme* (Dulu, J) where the courts have permitted the termination of serious charges of murder on the grounds that the families of accused and the victim had reconciled. While the Court, respectfully, takes the view that each case shall depend on its circumstances, a general principle may be laid down flowing from constitutional criteria for the prosecution, the withdrawal or termination of criminal cases in terms of Article 157 (11) of the Constitution by which the DPP is obliged to consider “public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

It must be demonstrated by the accused or the prosecutor who seeks the withdrawal or termination of a criminal case that, in the wording of the Constitution, the discontinuance (read settlement, withdrawal or termination of the criminal case) is justifiable under the parameters of the considerations of public interest, interests of justice and need to prevent abuse of the legal process. Indeed, in *Juliana Mwikali Kiteme* and *Abdow Mohamed* cases, supra, it was the DPP who made the application for settlement of the cases pursuant to alternative dispute resolution mechanism. See also *Republic v. Faith Wangoi*, Kajiado HC Criminal Misc. Application No. 1 of 2015.”

38. The more direct provision for amicable settlement in criminal cases is Section 176 of the [CPC](#) which entitles parties to engage in promotion of reconciliation and seek amicable settlement. The provision is as follows:

“176. In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.”(Emphasis added)

39. Thus the provisions for amicable settlement in the strict sense are limited to cases of “common assault, or for any other offence of a personal or private nature not amounting to felony”.

40. The [CPC](#) has provided another alternative to prosecution in the form of plea bargaining. The scope for plea bargaining agreements is under Part IV sections 137 A to 137 O. That notwithstanding, section 137N of the CPC excludes sexual offences from consideration under that Part. These provisions on plea agreement were passed under Legal Notice No 12 of 2012, following the promulgation of the Constitution 2010. In respect of section 137N, I understand legislative or statutory policy, post the [2010 Constitution](#), to be that sexual offences are unsuitable for plea bargaining agreement between parties. Thus, Section 176 of the [Criminal Procedure Code](#) when sought to be applied, should be read together with the Article 159(2)(c) of the Constitution.



41. In the case of *Republic v P K M* [2017] eKLR this court dismissed an application for revision by the DPP for an order of withdrawal by the magistrate’s court which the DPP thought was a threat to kill charges. Ngenye J (as she then was) held:

“...it is my view that notwithstanding the objection raised by the prosecution to the withdrawal of the case, courts must interpret the Constitution objectively. If interpreted in a stringent manner, the letter and the spirit of the Constitution would be mutilated to the extent that reconciliation becomes a tenet only known on the paper. This definitely would not conform to Article 159(2)(c). In my mind, that is why Section 176 of the Criminal Procedure Code still applies and should be read together with the said Article 159(2)(c).

42. Counsel for the applicant also argued that the complainant is now an adult of above 18 years, that she is able to comprehend and appreciate her decision; That she had time to deliberate on what is her best interest and to carefully consider the consequence of the withdrawal before submitting her withdrawal letter to the respondent. Thus that the DPP’s reliance on the principal of the best interests of the child are quite misplaced in these circumstances.

43. As already shown, however, the right of a complainant to withdraw a case is not unlimited. He must, in addition to making the request before a final order is made, also satisfy the court to exercise its discretion upon the grounds set out in the application. here, as shown, no grounds were contained in the request for withdrawal to trigger the exercise of the court’s discretion to withdraw.

44. In addition, I would agree with Muriithi J’s sentiments in *Republic v Peter Kinoti Nyamu* [2021] eKLR where he said, concerning withdrawal of criminal cases and the prosecution’s role, as follows:

“The DPP’s clear mandate may only be interfered with where it can be shown that by cogent evidence, in insisting on proceeding with a charge, the DPP is being unreasonable on the facts of the case, and or that by so doing, the DPP is violating the rights of the accused to fair trial under Articles 25 and 50 (2) of the Constitution or otherwise abusing the office of the DPP or the process of the court to serve motives ulterior to prevention of crime, prosecution and punishment of offenders under the state’s prosecutorial mandate under Article 157 of the Constitution.”

45. As discussed above, I do not think that the DPP’s action of objecting to the withdrawal in this case is without merit.

## Conclusion

46. In the Notice of Motion filed by the Applicant on 27<sup>th</sup> September, 2022 the orders sought are, essentially, inter alia, as follows: For review of the prosecution’s denial of the complainant’s request for withdrawal of the complaint. For a declaration that the charges against the applicant in Criminal S.O No. 11 of 2021 are withdrawn. That the court grant the request for withdrawal by JNM.

47. It is clear from the discussion above that a criminal case may be terminated by an act of the parties; by reconciliation under section 176 of the Criminal Procedure Code (CPC); withdrawal or discontinuance of the charge by the complainant under section 204 of the CPC; or by the prosecutor under Art. 157 (6) (c) of the Constitution and section 5 of the ODPP Act or section 87 of the CPC.

48. In the light of the issues considered herein, I am not persuaded that the law as currently existing entitles a complainant in a sexual offence to enforce withdrawal of the prosecution case through a bare application for withdrawal.



49. As further also noted, Section 176 *CPC* allows for promotion of reconciliation and facilitation of amicable settlement, and hence withdrawal, for offences not amounting to felonies as lawfully defined. Since the offence the applicant is charged with constitutes a felony, the amicable settlement provisions of Section 176 are not available to the applicant.
50. Ultimately, the orders sought in the applicant's application fail in their entirety, and the application is hereby dismissed.
51. The orders for stay of proceedings imposed on the lower court are hereby discharged.

**DELIVERED AT KERUGOYA THIS 30<sup>TH</sup> DAY OF MARCH, 2023**

**R MWONGO**

**JUDGE**

Delivered in the presence of:

Mr. Kahiga G for Wandia for the applicant

Mr. Mamba for the state

Mr. Murage, Court Assistant

