



**Nalinya v Office of the Director of Public Prosecution (Criminal Revision  
E230 of 2023) [2023] KEHC 19415 (KLR) (30 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19415 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL REVISION E230 OF 2023  
PJO OTIENO, J  
JUNE 30, 2023**

**BETWEEN**

**BONFACE NALIANYA ..... APPLICANT**

**AND**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT**

*(Being revision from the Ruling of Sylvia Wayodi (RM) in Kakamega  
CM's Court Criminal Case No. E167 of 2022 dated 13.3.2023)*

**RULING**

1. Before the trial court was a charge against the Applicant and accusing him of having occasioned grievous harm to one Ruth Amakove on the 24.01.2022.
2. After the accused pleaded not guilty, the matter proceeded to hearing, the prosecution availed all its witnesses and the court adjudged that the accused had a case to answer. The defence thereafter notified the court that the accused would give unsworn evidence without calling any other witness.
3. However, that was not to be. On the next date in court, the court was informed that the accused and complainant had negotiated and resolved to forgive each other. In fact, the complainant had sworn an Affidavit and stated unequivocally that she had out of free will and without coercion decided to forgive the accused. That Affidavit disclosed that the accused is the husband to the complainant and that the two have five children and that the two live happily and desire not to disrupt the marital harmony.
4. When parties, both the prosecution and defence, they agreed that the case be withdrawn.



5. In the Court’s reserved Ruling, delivered on the 13.3.2023 the court declined the request and said; after citing *Francis Macharia Nzeki -vs- Republic* [2021] eKLR:

“In the instant case the application for withdrawal has been made five times before the trial court and in the presence of 3 different prosecutors none of whom have allowed the said application. The prosecution has cited public interest and the gravity of the offence. The court has been keenly observing the demeanor of the complainant whenever the said applications were made and it is not convinced. Furthermore, the complainant once told the court she wishes to withdraw the matter so that the accused can fend for the issues of their union since the harm impacted on her interfered with her physical ability to perform physical activities. This court has dealt with this matter not once and not twice and it has to bring this issue to its finality. In the exercise of this court discretion and considering the reasons advanced before, the observation made by the court, the application is disallowed, and this matter shall be heard to finality.”

6. In the ruling, the disclosed reasons for declining the request for withdrawal are discernible to be; the fact that five applications had been made before; that the offence is grave; that the prosecution had closed its case and declined withdrawal on account of public interest and that the court needed to bring the matter to finality.
7. When this matter came before this court for mention to find out if the trial court file had been availed for purposes of perusal, both counsel told the court they left it to court to conduct the perusal and give a decision.
8. The mandate of the court upon request for revision is to seek to establish the legality, correctness or propriety of any order made by the trial court and includes the duty to establish if the proceedings were regularly conducted.
9. Having perused the record, it is not in doubt that very early in the proceedings, there were clear indications that the complainant had intended to withdraw her complaint and one of the consideration that came out clearly was the fact that the parties continue to live as man and wife and have five children to take care of. In fact, in one of her address to court, the complainant expressed herself that the accused should be released so that he can help her fend for the children.
10. Having conducted the perusal what comes out as the crux of the request for revision is whether it was just to decline a request to withdraw where the complainant had sworn an Affidavit which was appreciated by the prosecution to merit as basis for withdrawal. A determination of that question would invite consideration of other pertinent issues including where the best interest of the couple’s children lie and whether it was the court’s duty to consider the stability of the family as the core and basic unit of society.
11. When a court would accept a criminal case to be withdrawn is stipulated by sections 204 and 176 of the *Criminal Procedure Code*. The Code stipulates the two provisions read;

“ 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.



204. 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.”
12. While section 176 is clear that no felonies and aggravated offences are subject to compromise by parties, section 204 has no constraints. It allows the complainant, I take the view that a complainant needs to act through the direction of public prosecution, to be at liberty to seek withdrawal at any time provided the court has not pronounced its final order. The final order contemplated by the statutes, in my view, is the sentence. It is therefore the opinion and view of the court that Section 204 permits the withdrawal of the matter at any time even after a conviction but before the sentence is passed.
  13. That had always been the law even before the dawn of Constitution of Kenya 2010. Come the new Constitution, and there arrives new values and objects of administration of justice to include use and promotion of alternative justice systems and traditional dispute resolution.
  14. In adherence to article 159 (2), the Judiciary has developed, the Judiciary Alternative Justice Policy Baseline 2020. The Policy outlines when and how to apply alternative justice systems. The underscore is that while a court will determine a dispute, the outcome of court decisions are always adversarial and end up pleasing one side and aggrieving the other. In fact, in some case both parties leave the court dejected and feeling deprived of the chance to be in charge of their personal disputes.
  15. It has come a time when courts must, before reading a conviction or acquittal pose to ponder how that decision would affect the disputants and its ripple effects on the collateral disputants or those directly or collaterally affected by the decision.
  16. When a court is presented with an opportunity to consider employing alternative justice system, it has ready tools in that policy baseline and the provisions of article 159(3).
  17. In the instant case, the court had the last liberty under Section 204 to consider the applications for withdrawal on the basis that both the complainant and the prosecutor were singing the same tune. The court’s duty was to be satisfied that a case had been made out for withdrawal. It needed not be constrained by what the prosecution had said prior to the Affidavit by the complainant. The court needed not be constrained with its own previous decisions in not having the matter withdrawn.
  18. For its satisfaction, the court merely needed to be satisfied that the complainant was put under no undue compulsion or coercion outside free will. A perusal of the record does not show that the court evaluated the reasons put fourth for withdrawal and was not satisfied. In failing to discount the reasons as unsatisfying, in feeling constrained by prosecutions earlier stand and in ignoring the plea by the complainant that her physical ability had been compromised to make her less capable in providing for her children with the accused, in the absence of the accused the court erred.
  19. When looked at from the prison of alternative justice system, the duty of the court was to establish if the agreement between the parties contravened the bill rights; if the agreement between the two was repugnant to justice and morality or if its outcomes would be such repugnant and if it was inconsistent with *the Constitution*.
  20. These are considerations the court did not address by only tracing the parties addresses to the court pursuant to section 204, Criminal Procedure Code without inviting the constitutional dictate that alternative justice system be promoted.



21. Being a revision on the novel and budding subject of alternative justice system, the court finds itself duty bound to concede to what the trial court was expected to do.
22. The trial court was expected to appreciate that the parties, being those directly affected by the dispute, desired that the court does not deliver itself on their dispute. Having appreciated so, the duty then was to see if the compromised situation was achieving ends of justice and abiding with *the constitution* and the law and not contravening same or perverting it. It was also expected to appreciate if the case and its pendency in court affect people other than the accused and the complainant and that its final determination, if ultimately reached, would affect the primary parties and persons not primary parties when such persons are disclosed. It is now time that courts are reminded that the best interest of the child as a constitutional dictate is live so that the child does not become irrelevant victim of crime. The courts must stop treating children affected by crimes outside the Children's Act as the forgotten victims of crime but must, in passing sentences see to it that the best interest of the child is safeguarded.
23. Having concluded that the trial court erred in disallowing the request to withdraw, it is now directed that the file be placed before the Court for purposes of compliance with the law and this decision.

**Dated, signed and delivered at Kakamega this 30<sup>th</sup> day of June, 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:-**

No appearance for the Applicant

Ms. Chala for the Respondent/State

Court Assistant: Polycap

