



REPUBLIC OF KENYA



**Republic v Lekutit & 2 others (Criminal Case 11 of 2018)
[2023] KEHC 25858 (KLR) (22 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 25858 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL CASE 11 OF 2018
F GIKONYO, J
NOVEMBER 22, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

JACKSON SAI TIAGA LEKUTIT ALIAS JACK 1ST ACCUSED

JOSEPHAT KAISAIYIE LEKUTIT 2ND ACCUSED

NO. 2013054785 APC VINCENT GITONGA KIRINYA 3RD ACCUSED

RULING

1. On 18.10.2023, Ms. Torosi prosecution counsel stated that she had filed in court a memo to withdraw the case under section 87(a) of the CPC due to the unavailability of witnesses. She further stated that the investigating officer had made numerous efforts to procure the attendance of the witnesses to no avail. She stated that the witnesses are not traceable hence warrant of arrest may not help. Based on the memo her in-charge had applied to withdraw the case under section 87(a) of the CPC.
2. Mr. Mongeri advocate for the 1st and 2nd accused persons objected to withdrawal under section 87(a) of the CPC. He argued that the prosecution is simply trying to postpone the case only to later arrest the accused persons. He urged the prosecution to acquit the 1st and 2nd accused persons because it is the failure of the prosecution to procure witnesses.
3. Ms. Mogere counsel for the 3rd accused person concurred with Mr. Mongeri. She urged the court to reject the application and instead acquit the accused persons. She argued that despite the power to discontinue, DPP must exercise it in the public interest, in the interest of justice, and prevent an abuse of process. She stated that the matter has been in court for 5 years without any witnesses being produced. No efforts to secure the attendance of the witnesses which should have included a warrant of arrest. She argued that the prosecution is not keen on pursuing the matter. She stated that section 87(a) would be a travesty of justice to the accused persons as they would simply adjourn the accused



persons' tribulations only to arrest them later. She urged this court to deny the prosecution's request and ask them to close their case.

4. In a rejoinder, Ms. Torosi stated that she was relying on the memo and the affidavit by the investigating officer entirely.
5. The prosecution filed an affidavit to show efforts to trace witnesses sworn by PC Ngala Ochoo on 29.05.2023. He averred that he took over this matter from the late PC Daniel Owuor in the month of April 2019. The first hearing was on 29th and 30th of July 2019. The witnesses sent one of them Moses Lekutit on 09.07.2019 to collect bonds to attend court on their behalf but they failed to appear before court on the hearing day. Thereafter they started dodging him. He tried to trace them with the local police at Sakutiek but when they got wind of his presence they went to their hideouts. On 03.10.2019 he bumped to one of the witnesses Moses Lekutit who received the summons by signing. On 04.10.2023 he served one witness Kool Koroe who signed his summons. In the subsequent hearings his efforts to trace them proved futile. The local police could not trace them and if they did they told them that they had finished the case according to their Maasai culture. He drafted bonds to attend court on 06.07.2020 after failing to trace the witnesses he left the bonds with CPL Kamau at Sakutiek police post. CPL Kamau tried to trace the witnesses with village elder Nkawiya Nkoitiko and they managed to locate Kool Koroe who told them he had been warned by the family of Lekutit not to sign anything concerning the case. He refused to sign and CPL Kamau booked his findings vide Sakutiek police post OB no. 05/16/07/2020 and 06/16/07/2020. The trend continued till he engaged Mr. Charles Koroe a chairman of the peace committee Sakutiek who talked to the witnesses and later informed him that the family insisted that they had solved the issue locally as both parties are step-siblings. The SCCIO wrote to the ODPP Narok highlighting the challenges they were facing in bringing witnesses to court vide letters DCI/SEC/NAR/4/4/B/2021/(A)/83 dated 18/02/2021 and DCI/SEC/NAR/4/4/4/B/2022/(D)/30 dated 18.10.2022. Therefore, considering the above facts it has been and still might be difficult to secure the presence of the witnesses in court to give evidence.

Analysis and Determination

6. Upon consideration of the application, the affidavit on record, and the oral submissions by the parties, the court should determine whether these proceedings should be withdrawn under section 87(a) of the [CPC](#).
7. Section 87(a) of the [CPC](#) provides:

“In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal—

 - (a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts
 - (b)

Power to discontinue criminal proceedings

8. The Director of Public Prosecutions shall exercise State powers of prosecution and may—
 - 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) (article 157(6) (c) of the [Constitution](#)).



Exercise of power to withdraw charges

9. The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.’ (art. 157(8) of the [Constitution](#))
10. And: -

‘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’ 157(11) of the [Constitution](#))
11. This is a complete departure from the fiat and arbitrariness of the nolle prosequi.
12. Therefore, exercise of judicial discretion in giving or withholding permission to a discontinuance of a criminal proceeding should be guided by the facts of the case and in particular factors in article 157(11) of the [Constitution](#).
13. See the case of [George Taitumu v Chief Magistrate Court, Kibera & 2 others](#) [2014] eKLR the court stated:

‘Section 87(a) of the [CPC](#) gives the learned magistrate broad discretion to accept or reject an application for withdrawal of charges presented by the prosecutor. In light of Article 157(11) of the [Constitution](#), such discretion has to be exercised judiciously taking into account the facts of each case and in particular whether the application is brought in the public interest, the interest of administration of justice and the need to prevent and avoid an abuse of the legal process.’ (Emphasis added)
14. Where it is blatant that the prosecution is abusing the power to discontinue proceedings, permission should not be granted.

Consequences of discontinuance of proceeding

15. If the discontinuance of criminal proceedings;

‘...takes place after the close of the prosecution’s case, the defendant shall be acquitted.’ (art. 157(7) of the [Constitution](#))
16. The acquittal constitutes a right: -

‘not to be tried for an offence in respect of an act or omission for which the accused person has previously been... acquitted (art. 50(2)(o) of the [Constitution](#).)
17. If the withdrawal: -

‘..is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.’ (section 87(a) of the [CPC](#)).
18. But, in special circumstances of a case, the court may acquit the accused where withdrawal has been made before the accused is called to make his defence, and such acquittal will bar subsequent proceedings on the same facts.



Should the court grant permission to withdrawal?

19. The appropriateness of withdrawal under section 87(a) of the [CPC](#) has been challenged by the accused through their respective legal counsel especially on the basis that it is the prosecution which has failed to procure attendance of witnesses, yet, they seek withdrawal which may open the accused to future proceedings on same facts. They argued that in the circumstances of this case, an acquittal is most appropriate in line with the right of the accused.
20. In other words, the accused persons in seeking an acquittal upon the withdrawal of charges before the prosecution has closed its case, wishes to benefit from the right under article 50(2)(o) of the [Constitution](#)- not to be tried for an offence for which was acquitted- the legal protection against “double jeopardy” which gives rise to the right to the defence of ‘autrefois acquit’.
21. Are there circumstances that draw the court to order an acquittal upon withdrawal of charges before the prosecution has closed its case?.
22. The court record shows that the respondents were arraigned before the court on 08.10.2018 when the charge was read to them. The case was then fixed for hearing on several occasions thereafter. The court (Bwonwong’a J.) delivered a ruling on 10.12.2019 after the prosecution had made several requests for adjournments. An adjournment was granted. Since then the prosecution has been seeking adjournments after adjournments for reasons that there were no witnesses and the application has always been granted. The case was fixed for hearing on 24.07.2023 and again on that date the prosecution applied for adjournment due to non-attendance of witnesses. The respondents objected to the application and the prosecution stated their intention to apply for a withdrawal. But, in all these occasions, the prosecution had explained and even brought the IO to court to explain the efforts taken to procure the attendance of witnesses. The reasons given were found to be valid and reasonable and adjournment was granted.
23. On 18.10.2023, the prosecution applied to have the case withdrawn under section 87 (a) of the [Criminal Procedure Code](#).
24. According to section 87 (a). withdrawal of a case under the section requires the consent of the court. the [Constitution](#) uses ‘permission’ of the court, and consent in the section means permission of the court.
25. From the affidavit evidence of the investigating officer, frantic efforts were made to procure the attendance of witnesses to no avail. The specific attempts made to procure witnesses were tabulated in the affidavit by the IO. The reason given by the witnesses is that they settled the case according to the Maasai culture. It appears from a good number of murder cases before the court- this one included- an ominous trend is emerging; witnesses are not attending court during the hearing of cases on the basis that they have settled the case with the accused in accordance with their custom. This trend should be investigated in individual cases to establish the role of the accused or his agents in the refusal by witnesses to attend court. The prosecution should also invoke coercive power to compel attendance of witnesses. The court has noted that one willing witness, one Kool Koroe told the IO that he had been warned by the family of Lekutit not to sign anything concerning the case. He refused to sign the witness bond.
26. In these circumstances, the court finds that withdrawal herein under section 87(a) of the [CPC](#) has been made in good faith, in the public interest, interest of justice and need to prevent abuse of process.
27. In the upshot, permission is granted to the prosecution to withdraw the proceedings under section 87(a) of the [CPC](#). And, as the prosecution has not closed its case, the accused persons are discharged, but the discharge is no bar to subsequent proceedings on the same facts.



28. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 22ND DAY OF NOVEMBER, 2023.

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HON. F. GIKONYO M.

JUDGE

In the presence of:

Mr. Muraguri – C/A.

M/s Mogere holding brief for Mr. Mongeri for 1st and 2nd

Accused.

M/s Mogere for 3rd accused.

