



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Wekesa (Criminal Revision E126 of 2022)
[2022] KEHC 15869 (KLR) (29 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15869 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL REVISION E126 OF 2022
GMA DULU, J
NOVEMBER 29, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

CHRISPUS WABWIRE WEKESA RESPONDENT

RULING

1. This matter has been placed before this court pursuant to a letter dated March 23, 2022 from the Director of Public Prosecutions, in which this court has been asked to review the ruling of the trial magistrate, Hon Anastacia Ndungu SRM, made on March 23, 2022 in Makindu SPM Criminal case No 771 of 2019.
2. Consequent upon receipt of the said letter, I called for the trial court file in which Chrispus Wabwire Wekesa, was charged with assault causing actual bodily harm contrary to section 251 of the [Penal Code](#).
3. I note that, two prosecution witnesses had testified before the court made a ruling, which ruling was delivered because the prosecution asked for court's permission to withdraw the case under section 87(a) of the [Criminal Procedure Code](#) (Cap 75). In the ruling, the court declined the request of the prosecution to discontinue the criminal proceedings and, proceeded to close the prosecution case and, based on the evidence on record, acquitted the accused person.
4. Having perused the trial court file, the ruling of the trial court, and the provisions of the law applicable, I am of the view that the trial court erred in its application of the law. The decision of the magistrate's court is thus calls for this court's intervention under section 362 and 364 of the Criminal Procedure Code (Cap 75) to review the matter.



5. Indeed, under the provisions of Article 157(8) of the Constitution, the trial magistrate had powers to decline the request made by the Director of Public Prosecution to withdraw the criminal proceedings. For clarity, the said Article provides as follows –

'157(8) The Director of Public prosecutions may not discontinue a prosecution without the permission of the court.'

6. The error of the magistrate was however, with regard to the consequential orders of closure of the prosecution case and acquittal of the accused, as Article 157(7) of the Constitution provides as follows –

'157(7) If the discontinuance of any proceedings under clause (6) (c) takes place after close of the prosecution's case, the defendant shall be acquitted.'

7. In my view, the function of closing the case of the prosecution is for the Director of Public Prosecution who has the mandate to call the witnesses he wishes to call, and not a function of the trial court. Thus in my view, the trial court having declined the request of the prosecution to withdraw the case, and the prosecution neither calling further evidence nor closed the prosecution case, the trial court's available option was simply to discharge the accused person at that point. It is not a function of the court to close the prosecution in order to acquit the accused person. In any case, the reason why the Director of Public Prosecutions applied for discontinuance of the criminal proceedings in the first place, was the refusal of the trial court to grant an adjournment, for the prosecution to avail witness at the next hearing date, which means that there was no intention by the prosecution to close their case.

8. Though the Assistant Director of Public Prosecutions contends that the trial court was bound to allow the request of the State to withdraw the case, my view is that the court was perfectly entitled to reject the request for withdrawal of the criminal proceedings, as the previous provisions of entering Nolle Prosequi, where the court was not entitled to enquire into the reasons for discontinuance of criminal proceedings, was removed by the Kenya Constitution in 2010.

9. I thus exercise this court's revision jurisdiction to the extent that I set aside the closure by the trial court of the prosecution case, and set aside the consequent acquittal order. Instead I order that the accused person be and is hereby discharged, as the prosecution had not closed their case. The trial court file is hereby returned.

Delivered, Signed & dated this 29th day of November 2022, in open court at Makueni.

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George Dulu

Judge

