



**Mecha v Republic & 5 others (Anti-corruption and Economic Crimes Miscellaneous E059 of 2024)  
[2025] KEHC 4090 (KLR) (Anti-Corruption and Economic Crimes) (2 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4090 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIMES MISCELLANEOUS E059 OF 2024**

**LM NJUGUNA, J**

**APRIL 2, 2025**

**BETWEEN**

**PETER MANONO MECHA ..... APPLICANT**

**AND**

**REPUBLIC ..... 1<sup>ST</sup> RESPONDENT**

**YAGNESH MOHANLALA DEVENI ..... 2<sup>ND</sup> RESPONDENT**

**MAHINDRA PATHAK ..... 3<sup>RD</sup> RESPONDENT**

**BENEDICTMUTUA ..... 4<sup>TH</sup> RESPONDENT**

**PHANUEL OKWENGU ..... 5<sup>TH</sup> RESPONDENT**

**TRITON PETROLEUM CO LTD ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

1. Before the court for determination is the 6<sup>th</sup> accused/applicant's application dated the 4<sup>th</sup> day of December 2024. The same is brought under Section 364 of the Criminal Procedure Code, Article 50 of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act.
2. The application is premised on the grounds on its face and it is supported by the affidavit sworn by Peter Mecha, on the 4<sup>th</sup> day of December 2024 and it seeks the following orders: -
  - “ 1) Spent.
  - 2) That this Honourable Court be pleased to certify this matter as extremely urgent and dispense with service in the first instance.



- 3) That this Honourable Court be pleased to review the application made by the prosecution and reinstate the charges against the 2<sup>nd</sup> and 6<sup>th</sup> Respondents herein.
  - 4) That costs of the application be provided and paid to the Applicant
  - 5) Such further and other orders as this Honourable court may deem just to grant.”
3. It is the Applicant’s case that he is a co-accused in the protracted Anti-Corruption case number 18 of 2009 whose prosecution has been significantly impeded by the inexplicable absence of the 2<sup>nd</sup> Respondent/1<sup>st</sup> accused person who has been absconding the course of justice since 2010.
  4. That on the 6<sup>th</sup> day of August 2020, 2<sup>nd</sup> Respondent/1<sup>st</sup> accused person was inexplicably arraigned before Hon. Nzyoki, Chief Magistrate, who was not the trial court and in the absence of all the other accused persons, a development that was highly irregular and prejudicial to the interests of the Applicant and other co-accused persons.
  5. That on the 9<sup>th</sup> day of August 2024, the Director of Public Prosecutions, acting through Mr. Ombati, made an oral application to withdraw the charges against the 2<sup>nd</sup> Respondent/1<sup>st</sup> accused person pursuant to Section 87(a) of the Criminal Procedure Code in the absence of all the other accused persons contrary to the provisions of the law.
  6. That despite the denial of the initial withdrawal application, the 2<sup>nd</sup> respondent was subsequently charged in MCAC E030 of 2024. It was further deponed that undeterred by the initial rejection, the prosecution persisted in their effort to withdraw the charges against the 2<sup>nd</sup> Respondent on the 22<sup>nd</sup> October 2024 when a formal application was made and on the 28<sup>th</sup> October 2022, the court delivered a ruling granting the prosecution’s application and withdrawing the charges against the 2<sup>nd</sup> Respondent in ACCR No. 18 of 2009.
  7. The Applicant contends that as the co-accused persons were not afforded a fair opportunity to object or respond to the application to withdraw the charge noting that they face serious charge of conspiracy to defraud, the same constituted a grave violation of their fundamental right to a fair trial.
  8. The Applicant has further contended that the prosecution has exhibited a disturbing pattern of withdrawing charges, particularly against crucial witnesses to the prosecution’s case, such as the 3<sup>rd</sup> and 4<sup>th</sup> accused persons which conduct is clearly designed to undermine the integrity of the judicial process and to shield the 2<sup>nd</sup> Respondent from accountability.
  9. The 1<sup>st</sup> Respondent filed grounds of opposition dated the 5<sup>th</sup> day of February 2025 wherein it has set out the following grounds:-
    - “1) The application lacks merit, is misconceived and unsubstantiated.
    - 2) The application is an abuse of the court process since application for withdrawal of case against the 2<sup>nd</sup> was properly withdrawn under Section 87 A in line with the provisions of the Criminal Procedure Act Cap 75 Laws of Kenya.
    - 3) The 1<sup>st</sup> Respondent had discretion to withdraw case against the 2<sup>nd</sup> Respondent pursuant to Article 157 of the Constitution of Kenya 2010 and Section 87A of the Criminal Procedure Act.



- 4) It is the sole prerogative and discretion of the prosecution to prefer and make decision on the nature and number of witnesses to call such as are only necessary for purpose of proving its case beyond reasonable doubt.
- 5) There is no provision under law enabling the Applicant herein to move the court by way of application seeking orders for re-instatement of charges since withdrawn by the 1<sup>st</sup> Respondent against him.
- 6) The Applicant has not shown by way of demonstration to what extent if any, his right to fair trial shall be infringed as a result of withdrawal of charge against the 2<sup>nd</sup> Respondent.
- 7) The application lacks merit and same should be dismissed entirely to allow the case proceed as earlier scheduled to its logical conclusion.”

10. The application was disposed of by way of written submissions and both parties complied with the directions on filing of submissions.

### **Applicants submissions**

11. The Applicant identified two (2) issues for determination as follows:-

1. Whether the office of the Director of Public Prosecutions can withdraw charges against a party in the absence of co-accused.
2. Whether the charges against the 2<sup>nd</sup> and 6<sup>th</sup> Respondents herein ought to be reinstated.

12. On the first issue, the Applicant submitted on Section 87 (a) of the *Criminal Procedure Code* and relied on the case of *Kariuki v Director of Public Prosecutions (Criminal Revision E013 of 2023)* KEHC 1174 (KLR) on the powers of the court when faced with an application to withdraw criminal charges under Section 87(a) of the *Criminal Procedure Code*.

13. The Applicant further submitted that the corner stone of the criminal justice system is the right to be heard which is a right recognised both nationally and internationally and cited Article 50 of *the Constitution* of Kenya 2010. That by withdrawing the charges against the 2<sup>nd</sup> and 6<sup>th</sup> Respondents, the DPP has undermined the Applicant’s ability to present a complete and coherent defence that addresses the actions and intentions of all the individuals involved.

14. Further, that if the application herein is not allowed, the Applicant will be estopped from fully exploring the roles and culpability of alleged participants to disprove any meeting of the minds. That the arbitrary separation of co-accused persons in a matter of conspiracy violated procedural fairness and undermines the Applicant’s right to a fair trial as the remaining accused persons are left to face the full weight of the prosecution’s case without the benefit of a comprehensive examination of all alleged participants, which presents a risk whereby a potentially skewed version of events shall be presented before the court.

15. On the 2<sup>nd</sup> issue, it was submitted that, a court of law can only determine the guilt or innocence of an accused person after full hearing and it is not within the 1<sup>st</sup> Respondent jurisdiction determine the innocence of an accused person. That the 2<sup>nd</sup> and 6<sup>th</sup> Respondents having been jointly charged with other accused persons with the offence of conspiracy to defraud, their cases are conjunctive and cannot be at any time perceived as mutually exclusive especially when the alleged crime is one of conspiracy and common intention has to be proved.



16. That, as such, the co-accused persons being so co-joined cannot at the sheer whine of the prosecution be separated or severed by the legal process and the office of the DPP could not have withdrawn the case against the 2<sup>nd</sup> Respondent/1<sup>st</sup> accused and the 6<sup>th</sup> respondent/8<sup>th</sup> accused in the absence of all other accused persons. Reference was made to the case of *Aden Ali Abdi Vs Republic* (2014) KEHC 4257 (KLR) and that of *Grabral Bukachi Chapia Vs The Ethics and Anti-Corruption Commission* (2020) eKLR.
17. The Applicant contended that the application dated the 22<sup>nd</sup> October 2024 was made in a court that was not the trial court and which was not well versed with the history of the case and all its peculiarities. Further, that the same was made in the absence of the other accused persons which was highly prejudicial to them. The Applicant cited the case of *Director of Public Prosecution Vs Charles Kiprotich Tanui and 2 Others* (2024) eKLR in which the court rejected an application for withdrawal of criminal charges.
18. The Applicant further submitted that the case having been in the corridors of justice since the year 2009, and the court having heard all the prosecution witnesses, it was not in public interest for the 1<sup>st</sup> respondent to withdraw the case against the two accused persons when it was pending a ruling on “a case to answer”. The Applicant urged the court to take judicial notice of the immense public, private and judicial resources that have been employed in the prosecution of the case.
19. On its part, the 1<sup>st</sup> Respondent isolated three (3) issues for determination as follows: -
  - a. Whether it was legally proper for the 1<sup>st</sup> Respondent to withdraw charges against the 2<sup>nd</sup> Respondent/1<sup>st</sup> accused who was jointly charged with others before the court.
  - b. Whether the 1<sup>st</sup> Respondent by so withdrawing the charge against the 2<sup>nd</sup> Respondent/1<sup>st</sup> accused acted contrary to any law governing withdrawal of charges against accused person/ persons under the *Criminal Procedure Code* Cap 75 Laws of Kenya and *the Constitution* of Kenya 2010.
  - c. Whether withdrawal of charges against the 2<sup>nd</sup> Respondent was prejudicial to the interest of the Applicant who was the 6<sup>th</sup> accused person in the case pending hearing and determination in the Magistrate’s court.

### **1<sup>st</sup> Respondent’s submissions**

20. Submissions were made on Section 87(a) of the *Criminal Procedure Code* and Article 157 of *the Constitution* on withdrawal of criminal charges and the Director of Public Prosecution’s power to prosecute in criminal cases. Reliance was placed on the cases of *ITA Vs Siakago* (Misc. 62 of 2019) and Constitutional Petition No. 169 of 2020 (*Martin Nyakiamo S. Wanya Vs Director of Public Prosecutions & 2 others and Charles Ogega Ongwae & 5 Others*) and Constitutional Petition No. 208 of 2020 and Constitutional Petition E037 of 2020.

### **Analysis and Determination**

21. The only issue for determination is whether the Applicant’s prayer for an order of revision is merited.
22. The application before the court has mainly been brought under Section 364 of the *Criminal Procedure Code*. It states:-

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or



propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

23. The applicant contends that the court erred by allowing withdrawal of the charges against the 2<sup>nd</sup> and 6<sup>th</sup> Respondents hereinunder Section 87(A) of the [Criminal Procedure Code](#). The said section provides as follows: -
- “ 87. 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.”
24. Article 157(6)(7)(8) and (10) of [the Constitution](#) vests the DPP with express powers to prosecute all criminal cases on behalf of the State. Under those powers, the DPP can therefore initiate, continue or choose to discontinue any criminal prosecution before a court of law.
25. The powers vested on the DPP to discontinue criminal charges against any person/persons is provided for in Section 87(a) of the [Criminal Procedure Code](#); which can be exercised at any time before the final judgment.
26. However, when exercising its power under Section 87(a) the DPP requires the consent of the court in order to withdraw charges under that section. This, in my view, means that the court has the discretion to give or refuse to give the consent. My further view is that the DPP does not have absolute powers to withdraw charges under Section 87(a) as the court has to give its consent before such withdrawal can be accepted.
27. Article 157(11) provides that in exercising the powers conferred by this Article, the DPP shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of legal process. Though the DPP under Article 157(10) shall not require the consent of any person or authority for the commencement of criminal proceedings in the exercise of his or her powers or functions and shall not be under the direction or control of any person or authority, Article 157(11) imposes a mandatory duty on him to have regard to the three (3) considerations set out therein. And the word used is SHALL.
28. Therefore, in considering the prosecution’s application under Section 87(a), the court before granting the consent should interrogate the reasons for withdrawal in line with Article 157(11) of [the Constitution](#) and if the parameters set out therein are not met, the court should decline to the application for withdrawal of the charges pursuant to the powers granted to it under Article 157(8) of [the Constitution](#).
29. Going back to the application, I have gone through the proceedings of 7<sup>th</sup> August 2024, 29<sup>th</sup> October 2024 and 30<sup>th</sup> October, 2024 in ACC number 18/2009 which are the subject of this revision. The Applicant herein was charged alongside the 2<sup>nd</sup> and 6<sup>th</sup> Respondents in ACC number 18/2009. From the record, the case proceeded in the absence of the 2<sup>nd</sup> and 6<sup>th</sup> Respondents and by the time this revision was filed the prosecution had closed its case and it was pending ruling on “a case to answer”. That ruling was later delivered on the 10<sup>th</sup> December 2024.



30. The case is being handled by Hon. I.N. Baraza and on the 6<sup>th</sup> August, 2024, the 2<sup>nd</sup> Respondent was taken before Hon. Nzyoki as Hon. I.N. Baraza who has the conduct of the case was away on official duties and since he was taken to court under a warrant of arrest, which had been in force for 16 years, it is reasonably expected that the other accused persons would not be in court on that date.
31. The prosecution applied orally to sever the charges for the reason that the case was at an advanced stage and had gone on without the participation of the 2<sup>nd</sup> and 6<sup>th</sup> Respondents herein. The court ordered that the case be mentioned on the following day for the prosecution to make an application to sever the charges, and for taking of plea to the new charge. The 2<sup>nd</sup> Respondent was remanded at Kilimani Police Station awaiting production in court the following day.
32. On the 7<sup>th</sup> August, 2024, the prosecution applied to have the case withdrawn under Section 87(a) of the CPC. The prosecution argued that the 1<sup>st</sup> and the 6<sup>th</sup> Respondents did not take plea in the case and it was pending a ruling on “a case to answer” and by then, the 2<sup>nd</sup> and 6<sup>th</sup> Respondents had been charged in ACC Number E030/2024 which was coming up for plea the same day. In supporting the application to have the case withdrawn, the prosecution submitted that proceeding with the case will not serve justice and prayed that the 2<sup>nd</sup> and 6<sup>th</sup> Respondents be allowed to take plea in the new case.
33. The learned magistrate considered the application and found that the withdrawal of the case was in the public interest and it promotes the interest in the administration of justice. The court reasoned that to retain the 2<sup>nd</sup> and 6<sup>th</sup> respondents would not only cause hardship and delay to the prosecution but also to the other accused persons. Further, that the application was self-explanatory, merited and in no way an abuse of the court process. And with that, the prosecution was allowed to withdraw the charge under Section 87(a) and the 2<sup>nd</sup> and 6<sup>th</sup> Respondents were discharged from the proceedings.
34. On the same day, the 7<sup>th</sup> August, 2024, the 2<sup>nd</sup> and 6<sup>th</sup> Respondents were arraigned before the court and were charged with the same charges and they took plea in the new case being ACC E030 of 2024. However, on the 9<sup>th</sup> October 2024 the prosecution applied to have the case also withdrawn under Section 87(a) of the CPC citing unavailability of witnesses as some of them had since died and the other key witnesses had been uncooperative and unwilling to attend court, as some of the reasons for the withdrawal.
35. The court in its ruling delivered on the 28<sup>th</sup> October 2024 allowed the application and proceeded to discharge the accused persons (who are now the 2<sup>nd</sup> and 6<sup>th</sup> Respondents in this application.)
36. The Applicant in challenging the withdrawal of the charges particularly in ACC No. 18 of 2009 have argued that it was done in the absence of other accused persons and that they were not afforded an opportunity to object or respond to the said application. He has also contended that the same constitutes a grave violation of their fundamental rights to a fair trial.
37. As the court has observed hereinabove, when the charges were withdrawn, the 2<sup>nd</sup> Respondent has been brought to court under a warrant of arrest and the other accused persons would not have been expected to be in court, in the circumstances. The trial magistrate was away on official duties and this has not been disputed.
38. When the application was made, the court considered the guiding principles in an application for withdrawal under Article 157(11) of *the Constitution* and granted the same after it found the application to have been merited. The court notes that the investigative agency was present in court and it confirmed to the court that it was aware of what was happening in the case and they did not have any objection to the withdrawal.



39. Considering the reasons that the court was given for the withdrawal in light of Article 157(11) of *the Constitution*, in my considered view, it did not err in allowing the withdrawal of the case. The two respondents had not taken plea in the case; they had not participated in the hearing and the case had advanced to the stage of “a case to answer”. In the obtaining circumstances, it made sense for the prosecution to apply to have the case withdrawn and charge the two Respondents afresh. Unfortunately, the other case was also withdrawn a few days after the plea was taken. That second withdrawal has not been challenged before this court and say no more about it.
40. The Applicant has contended that the withdrawal of the charges in his absence undermines his right to a fair trial and his ability to present a complete and coherent defence that addresses the actions and intentions of all the individuals involved. Unfortunately for them, this is not one of the parameters that the court is under duty to consider under Article 157(11) of *the Constitution*.
41. In the end, I find that the revision application has no merit and it is hereby dismissed.
42. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 2<sup>ND</sup> DAY OF APRIL 2025.**

.....

**L.M. NJUGUNA**

JUDGE

In the presence of:-

Mr. Kelvin Mogeni for the Applicant

Mr. Mong'are for the 1<sup>st</sup> Respondent

No appearance for the other Respondents

Court Assistant – Adan.

