



**Kitengo v Republic (Revision Case E043 of 2025)
[2025] KEHC 12637 (KLR) (17 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12637 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
REVISION CASE E043 OF 2025
A MABEYA, J
SEPTEMBER 17, 2025**

BETWEEN

ABDALLA OTIENO KITENGO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Abdalla Otieno Kitengo ('the applicant') was on 6/9/2022, charged with another in Tamu Principal Magistrate's Court Criminal Case No. E121 of 2024 of the offence of conspiracy to commit a felony contrary to section 393 of the Penal Code. They also faced a second count of making false statement in connection with the disposition affecting land contrary to section 103(a) of the [Land Registration Act](#).
2. The particulars were that on diverse dates between 8/4/2015 and 15/7/2016, at unknown places in Muhoroni Sub-county within Kisumu County, they conspired to commit a felony, namely, making false information in order to obtain registration of land belonging to Group Five Holdings Ltd. That between those dates, they knowingly made false information both orally and in writing in connection with disposition of land No. Kisumu/Chiga/2394 belonging to Group Five Holdings Ltd.
3. The charge sheet was later amended on 4/12/2023 whereby the 2nd accused was removed and 3 more charges were added against the applicant. These were; giving false information to a person employed in public service contrary to section 129(A) of the Penal Code and uttering false documents contrary to section 352 of the Penal Code. He denied the charges.
4. Four (4) witnesses testified on 20/2/2024 and 3/4/2024. On 8/7/2024, the matter was adjourned to 29/7/2024 for lack of witnesses. On 29/7/2024, the prosecution once again applied for adjournment for lack of witnesses with a warrant of arrest being issued against the Investigation Officer.
5. On 3/9/2024, the Investigating Officer appeared and explained to the Court the difficulties he was having in securing the witnesses. The prosecution applied for adjournment which the applicant



vehemently opposed. The Court declined to grant the adjournment as a result of which the prosecution applied to withdraw the case under section 87A of the Criminal Procedure Code. The applicant opposed the same and prayed that the same be terminated either under section 202 or 210 of the Criminal Procedure Code. The Court, nevertheless allowed the withdrawal under section 87A of the Criminal Procedure Code.

6. Vide a letter dated 31/1/2025, the applicant applied for the review of that decision contending that the proceedings should have been terminated either under section 202 or 210 of the Criminal Procedure Code. He contended that there was no complainant as none had appeared to testify.
7. The parties filed their respective submissions dated 13/6/2025 and 30/6/2025, respectively. It was submitted for the applicant that the Court had the jurisdiction to review the order of the Court. The case of R –vs- DPP & Anor Exparte Wilfred Thiong’o Njau [2015] eKLR was relied on. That the Court should have acquitted the applicant under section 202 of the Criminal Procedure Code instead of allowing the withdrawal of the case under section 87A. The cases of R –vs- Edwin Otieno Ocholla & Anor [2018] eKLR were relied on in support of that submission.
8. For the State, it was contended that the main consideration was whether the withdrawal of the case under section 87A of the Criminal Procedure Code was correct, legal, proper or irregular. That since the applicant has not been put on his defence, the application of section 87A was correct. That the Court should be hesitant to curtail the DPP’s discretion on the conduct of his duties under *the Constitution*. The case of R –vs- Leonard Daye Sekento HCC Rev. No. 1 of 2018 was relied on in support of that contention.
9. This is a revision challenging the lower court’s exercise of discretion to allow the withdrawal of a case under section 87A of the Criminal Procedure Code. That section provides: -
 - “(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) if it is made after the accused person is called upon to make his defence, he shall be acquitted.”
10. The provision permits the DPP to withdraw any criminal case against an accused person at any stage of the proceeding before judgment. This however, has to be with the consent of the Court. That consent is an exercise of discretion. Like all other discretions, it is not to be exercised capriciously but judiciously. In this regard, the Court will consider whether it is in the interests of justice that the application be allowed; whether it is proper in the administration of justice, what the respective rights of the parties involved are.
11. The Court has to take into considerations the foregoing factors because of several reasons. Firstly, if it is made at the earliest stage of the proceedings, the parties would not have been expended or highly prejudiced, both the complainant and the accused. That is why an accused can be re-charged if the withdrawal is, before he is put on his defence. Secondly, if it is after he is put on his defence, it calls for an acquittal. Thirdly, justice delayed is justice denied. Article 159 (2) (b) of *the Constitution* is clear on that aspect. An application that is made after a case has been in the Court for a long time is prejudicial to an accused. The criminal process should not be unleashed on an accused and sustained for a long time then abruptly terminated without good reason.
12. This Court agrees with the State that, the powers of the DPP should not be unnecessarily curtailed. It is him whom *the Constitution* has bestowed with the power of the prosecution of criminal cases.



However, that power is not to be exercised unreasonably. That is why, in an application for withdrawal, the consent of the court is required.

13. In the present case, the application for withdrawal was made after 4 witnesses had testified. The charge sheet showed that the DPP had intended to parade a total of 8 witnesses. The case was therefore only half way. By allowing the application, the DPP still had the liberty to re-charge the applicant under section 87A of the Criminal Procedure Code. That is a possible likelihood.
14. One very crucial point which any court exercising the discretion under section 87A of the Criminal Procedure Code has to consider is, why is the application being made? What benefit will it confer in the administration of justice? Why was the prosecution lodged in the first instance?
15. In this case, the prosecution was lodged on 14/4/2023. The application was made on 3/9/2024, that is, after 1 year and 5 months of the prosecution. What was the reason for the withdrawal?
16. After being forced to appear under a warrant of arrest, the Investigating Officer told the Court on 3/9/2024 that: -

“I am 108786 PC Jackson Munyua attached to DCI Muhoroni. I bonded witnesses who were to appear virtually. I talked to the complainant but the witnesses are unreliable on phone. I sent him the link but despite my efforts they are unreachable. I can't reach them at the moment at all.”
17. This was not the first time the witnesses had failed to turn up.
18. While it is sometimes difficult to reach witnesses, it must be held in mind that, it is because of their statements that an accused is arraigned in court. In this case, the complainant whose complaint had led to the initiation of the proceedings was reached by the Investigating Officer and given a link. He failed to appear and testify. I think this was a proper case where the Court should have exercised its discretion under section 202 of the Criminal Procedure Code rather than section 87(a) of the Criminal Procedure Code. The complainant had intended to use the proceedings not as a process for justice but one for oppression by punishing the accused. It should be remembered that whilst an accused is duty bound to attend court at all appearances the complainant is only expected to appear once when he is to testify. Here he failed to attend.
19. The complainant was alleged to be a company known as Group Five Holdings Ltd. PW 1 was one Epainto Aporo Okoyo told the Court that he did not have anything to show that he was testifying on behalf of that company. Indeed, in re-examination, he stated:-

“Therein I am here to speak as to what I saw and not necessarily on behalf of Group Five.”
20. That being the case, the complainant had not testified. It had failed to avail its witnesses. The case belonged to it and not the Investigations Officer who expressed frustrations tracing and bringing witnesses to court. There is no way the threat of the charges should have been left to continue hanging over the head of the applicant. This was a case where the Court should have invoked its powers under section 202 of the Criminal Procedure Code and not 87A.
21. It is clear from the ruling of 3/9/2024 that the Court did not give any reasons for allowing the withdrawal under section 87A of Criminal Procedure Code considering that the same had vehemently been opposed. The Court did not consider the foregoing factors.



22. Accordingly, the order of 3/9/2024 is hereby reviewed. The same is set aside and substituted with an order dismissing the charges under section 202 of the Criminal Procedure Code and acquitting the applicant accordingly.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF SEPTEMBER, 2025.

A. MABEYA, FCI Arb

JUDGE

