



**Mawejie & 4 others v Republic (Miscellaneous Criminal Application
E012 of 2022) [2023] KEHC 21594 (KLR) (5 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21594 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
MISCELLANEOUS CRIMINAL APPLICATION E012 OF 2022**

SN MUTUKU, J

JULY 5, 2023

**IN THE MATTER OF AN APPLICATION BY SULAH MAWEJIE, CHRIS WASSWA,
RODGERS AINEBYOONA, STEPHEN SSEBUMMA, ROBERT LUZINDA AND
IN THE MATTER OF NGONG CRIMINAL CASE NO. MCSO E044 OF 2021
AND IN THE MATTER OF THE DIRECTOR OF PUBLIC PROSECUTION**

BETWEEN

**SULAH MAWEJIE 1ST APPLICANT
CHRIS WASSWA 2ND APPLICANT
RODGERS AINEBYOONA 3RD APPLICANT
STEPHEN SSEBUMMA 4TH APPLICANT
ROBERT LUZINDA 5TH APPLICANT**

AND

REPUBLIC RESPONDENT

RULING

Background

1. The above Applicants were charged before the Ngong SPM's Court with the offence of Gang Rape contrary to section 10 of the *Sexual Offences Act*, No 3 of 2006. The trial did not take off due to the non-attendance of the complainant. After several adjournments at the instigation of the prosecution for reasons that the complainant was not available, the prosecution applied to withdraw the charge under section 87(a) of the *Criminal Procedure Code*. The trial court allowed the application and discharged the accused persons.
2. It is this order that has necessitated this application. The accused persons have filed a Notice of Motion dated March 10, 2022 in which they seek the following reliefs:



- i. That this Honourable Court reviews and/or varies the Honourable Ruguru orders issued on January 24, 2022 in criminal case number E044 of 2021 discharging the accused under section 87 of the *Criminal Procedure Code* and in its stead, direct that the Applicants be and are hereby acquitted under section 202 of the *Criminal Procedure Code*.
- ii. That cost be in the cause.

Arguments For And Against

3. In support of the application the applicants have advanced grounds found on the face of it and in the supporting affidavit of Sulah Maweje, the 1st accused person (applicant). It is the case for the applicants that they are Ugandan Nationals who are refugees in Kenya under the United Nations High Commission for Refugees (UNHCR); that on April 15, 2021 they were arrested at Matasya area in Kajiado County and were charged with 2 counts that of gang rape and being in the country illegally and that the latter count was however dropped.
4. It is their case that when the matter came up for hearing the same did not proceed as the complainant could not be located; that this remained the case every time the matter was scheduled for hearing; that as a result of non-attendance by the complainant who had relocated to Uganda, the prosecution sought to withdraw the charges which was allowed by the court; that they were discharged under section 87 of the *Criminal Procedure Code*.
5. They have stated that as a result of the criminal charges brought against them their application for relocation by the UNHCR was halted. They have asked this court, it is in the interest of justice, to review the orders discharging them under section 87 of the *Criminal Procedure Code* and instead order that they be discharged under section 2020 of the said Code.
6. When the matter came up for hearing on July 14, 2022, counsel for the applicants argued that the complainant had lost interest in this case and relocated to Uganda where his contacts were changed and was therefore unreachable. He argued that the applicants are liable to be charged with the same offence. He argued that the Investigating Officer has all the time to investigate the whereabouts of the complainant from the time this application was filed to the time it was placed down for hearing but he has not done so. They urged that this court invokes its discretion and grants the reliefs sought.
7. In reply, counsel for the prosecution argued that the accused persons were charged with the offence of gang rape and asked court to take judicial notice of the trauma in such cases. She argued that there is no evidence showing that the complainant has lost interest in the case; that the order of the lower court was fair and that the rights of the accused persons have not been compromised. Further that it is premature to ask for the review of the orders.

Analysis and Determination

8. I have read the lower court record. It is clear that the reasons for termination of the criminal proceedings against the applicants was informed by the failure of the complainant to attend court for the hearing of the criminal charge against the applicants.
9. This court is clothed with powers under section 362 of the *Criminal Procedure Code* to 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. The court can be moved by a party seeking revision or it can act *suo moto*.



10. I have noted that the applicants, through their counsel, did not oppose the application by the prosecution to withdraw the charges against them under section 87(a) of the [Criminal Procedure Code](#). This section provides is titled “Withdrawal from prosecution in trials before subordinate courts”. It provides that:

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. if it is made after the accused person is called upon to make his defence, he shall be acquitted.
11. The above provision is distinguishable from the provisions of section 202 of the [Criminal Procedure Code](#). This section is titled “Non-appearance of complainant at hearing”. It provides thus:

If, in a case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the court under arrest, then, if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the court shall thereupon acquit the accused, unless for some reason it thinks it proper to adjourn the hearing of the case until some other date, upon such terms as it thinks fit, in which event it may, pending the adjourned hearing, either admit the accused to bail or remand him to prison, or take security for his appearance as the court thinks fit.

12. It is clear from the two provisions of the law that the reasons for withdrawal of charges is distinguishable. Section 202 of the [Criminal Procedure Code](#) is specific to non-attendance of the complainant. The withdrawal of charges under section 202 above is a consequence of non-attendance of the complainant while under section 87(a) above, the withdrawal may be informed by any other circumstance.

13. The discretion of the court to apply section 87(a) of the [Criminal Procedure Code](#) was discussed by the court in [George Taitumu v Chief Magistrate Court, Kibera & 2 others](#) [2014]eKLR as follows:

“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.”

14. The same reasoning is applicable in applying section 202 of the [Criminal Procedure Code](#). Both sections of the law allow the trial court immense discretion to allow or decline the withdrawal of a case. Did the trial magistrate err in the exercise of her discretion?

15. I have considered the nature of the offence facing the applicants in the lower court. It is a serious offence. While I consider that the complainant has a right to get justice from the court, he or she must



be available to give evidence in support of the charge. Failure to attend court to give evidence against the accused persons, after he or she has been summoned and informed of the date, time and place of the trial, is prejudicial to an accused person who has attended court for his trial.

16. In this case, the record shows that the complainant was aware of the date, time and place of hearing but failed to attend court. The hearing was to proceed virtually but the complainant was not available. The explanation given by the Investigating Officer was that he had lost contact with the complainant and he did not know his whereabouts. This necessitated the application to withdraw the charge under section 87(a) of the *Criminal Procedure Code*.
17. Given the history of the case of non-attendance of the complainant, it is considered view that the best action the trial magistrate ought to have taken was to invoke the provisions of section 202 of the *Criminal Procedure Code* and acquit the accused persons. From the record of the court, it is clear that the trial magistrate did not address her mind to the reasons why the trial had not taken off. Had she addressed her mind to that fact, she would have known the correct provisions of the law to invoke and exercise her discretion as the law demands.
18. The wording of section 202 is couched in mandatory terms

If, in a case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the court under arrest, then, if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the court shall thereupon acquit the accused, unless for some reason it thinks it proper to adjourn the hearing of the case until some other date, upon such terms as it thinks fit, in which event it may, pending the adjourned hearing, either admit the accused to bail or remand him to prison, or take security for his appearance as the court thinks fit. (emphasis added).

19. After careful analysis of this matter, it is my considered view that the Notice of Motion under consideration is merited. I allow the same and review the orders of the trial court to the effect that all the accused persons are acquitted under section 202 of the *Criminal Procedure Code* for non-attendance of the complainant.
20. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 5TH JULY 2023.

S. N. MUTUKU

JUDGE

