



**Otieno & 2 others v Republic (Criminal Revision E008 of 2023)  
[2023] KEHC 19829 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19829 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL REVISION E008 OF 2023  
DO OGEMBO, J  
JULY 6, 2023**

**BETWEEN**

**WILFRED ANYIKO OTIENO & 2 OTHERS ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. By way of a written application dated April 11, 2023, the Office of Director of Public Prosecutions has moved this court for the following orders:-
  - a. That this court immediately calls for the record of proceedings and the impugned ruling in Ukwala PMCR case No E082/2022 to satisfy itself as to its correctness, legality, regularity and propriety in line with fair administration of justice.
  - b. That upon calling for the aforesaid record, this court be pleased to revise the orders dated March 28, 2023, declining to allow an application to withdraw the case under section 87A as directed by the in charge ODPP, Siaya on January 10, 2023.
  - c. That this court be pleased to revise, vary and set aside the orders given by the subordinate court on March 23, 2023 so as to accord fair administration of justice.
  - d. That this court be pleased to invoke its power and jurisdiction to review orders of the subordinate court under articles 165 (60 of the Constitution and section 362 of the Criminal Procedure Code and to issue any other order as it may please and deem necessary to meet the demands of fair administration of justice including but not limited to:
    - i. Make a determination to the effect that the decision and orders issued were irregular and contrary to the prosecutions right to fair trial and due process for law under article 25(2) of the Constitution.



- ii. That the trial magistrate exercised her discretion wrongly, improperly and outside the provision set out under article 25(1) of the [Constitution](#).
  - iii. Revise the orders and ruling delivered on March 28, 2023 on declining to allow the prosecution application of withdrawal under section 87A and ordering that the matter proceed for hearing on April 21, 2023.
2. When this application came up for hearing on May 23, 2023, Ms Mumu, appearing for the applicant the Director of Public Prosecutions, submitted that the prosecution had made an application before the principal magistrate, Ukwala law courts, under section 87 (a) of the [Criminal Procedure Code](#) because of new evidence that came up after the accuseds had been charged in court. That after charging the accuseds, it came to the notice of the Director of Public Prosecutions that the 1<sup>st</sup> accused had also been seriously assaulted and had made a report at Ugunja Police Station via OB No 24/4/7/2022, and the relevant file had not been forwarded to the prosecution office. Further, that 1<sup>st</sup> accused had even presented witnesses, some of whom ended up being charged as his co-accuseds. That this is what formed the decision to apply for withdrawal of the case under section 87 (a) of the [Criminal Procedure Code](#), an application that the court rejected.
3. Mr Otieno, appearing for the accuseds, supported the application of the Director of Public Prosecutions. He submitted that under article 157, the DPP is given powers including of discontinuing proceedings at any stage, while section 87(a) of the [Criminal Procedure Code](#) allows accuseds to be charged again. That part of the reasons given by the prosecution were fresh information. That the first report of assault was by 1<sup>st</sup> accused, but no action was taken on his complaint. That police ought to have considered this fact before arresting him.
4. Counsel referred the court to article 50 of the [Constitution](#) on fair trial and that there is a danger of a mistrial in this matter. He relied on [R v Ssekento](#) (2019) eKLR where the Hon Justice Nyakundi ruled that the trial court must consider section 87 (a) vis-a-vis article 157 of the [Constitution](#) on powers of the Director of Public Prosecutions and the rights to fair trial under article 50 of the [Constitution](#). Counsel went on that withdrawal does not mean the accuseds cannot be charged again and that the court does not intervene, the rights of the accuseds would be infringed on especially the right to non-discrimination. And lastly, that the reason given by the prosecution was even contained in the letter of the ODPP that was presented to the application and so is not new evidence being raised at this stage.
5. Mr Akewa, appearing for the complainant, opposed this application of the prosecution. That the issue of equality before the law under article 27 (1) of the [Constitution](#) would be at play since the 1<sup>st</sup> accused is a chief.
6. That section 20 of the [Victim's Protection Act](#) demands that before a decision is made in a case of personal injury, the victim must be consulted and that in this case, there is no evidence to show that the victim herein was consulted. Counsel relied on the authority in the famous case of [Joseph Hendrix Waswa v R](#) [2019]eKLR.
7. Further, that whereas article 157 of the [Constitution](#) gives the Director of Public Prosecutions powers, such powers are under the supervision of the court (article 157 (8) and that public interest outweighs those of the accuseds. That the court rightly ruled that there was evidence against 1<sup>st</sup> accused and 2 officers, and the DPP cannot selectively determine who to prosecute. That the only reason for the termination is that 1<sup>st</sup> accused also made a report.
8. Counsel also went for further that the personal interest of the victim ought also to be considered, having been hospitalized for 2 weeks. Lastly, relying on [George Taitumu v CM's court, Kibera and](#)



2 others (2014) eKLR (Majanja J), counsel submitted that withdrawal powers must be exercised judiciously and whether the application is brought in public interest. Counsel urged the court to deny the prosecution's application.

9. Ms Mumu made further submissions to the effect that section 87 should not be allowed to stifle the powers of the DPP under article 157 of the Constitution. And that the trial court ought to have considered both the rights of the accuseds and the victims. That in the Joseph Hendrix Waswa case (par, 72 to 77), it was held that the victim has no active role to charge or to prosecute and do not have powers to prosecute on behalf of the Director of Public Prosecutions, who must at all times maintain control and supervision of the case. It was confirmed that this application is made in good faith.
10. I have considered this application and the submissions made by the parties and the authorities cited by the parties.
11. This application seeks to revise the orders of the Hon Principal Magistrate, Ukwala Law Courts, made on March 28, 2023 in criminal case number E082 of 2022. The said orders dismissed the application of the prosecution to have the said case withdrawn under section 87 (a) of the Criminal Procedure Code. The complainant's side have opposed the prosecution's application both before the trial court and before this court during the hearing of this revision application.
12. The issue in this application and indeed the objection that has been raised to it by the complainant's side is whether the Director of Public Prosecutions has the legal mandate and authority to seek the withdrawal of this case under section 87 (a) of the Criminal Procedure Code in the manner in which he intends to do so. In deciding on this application, it is important to consider the constitutional mandate of the Director of Public Prosecutions.
13. Article 157 (6) of the Constitution spells out the powers and responsibilities of the office of Director of Public Prosecutions. The same provides;  

“The Director of Public Prosecutions shall exercise State powers of prosecution and may-

  - a. Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
  - b. To take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person of authority; and
  - c. Subject to clause (7) and (8) discontinue at any stage before judgement is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).
14. The Constitution of Kenya therefore rests absolute powers of Public Prosecution on the office of the Director of Public Prosecutions.
15. And the powers extend from the institution of the criminal cases, taking over of such cases at any stage of the proceedings before Judgement is delivered.



At sub-article (8),

“The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.”

16. The Constitution therefore demands that in seeking to discontinue a criminal case, the Director of Public Prosecutions must seek and obtain the permission of the court, the Director of Public Prosecution must show to court tangible reasons for the discontinuation that he seeks of the relevant case. The converse being that should the Director of Public Prosecutions fail to give such reasons as would justify the intended discontinuation, then the court could decline the application to discontinue the case or proceedings.

The Constitution at sub-article 10, clearly states;

“The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions shall not be under the direction or control of any person or authority.”

17. Therein is enshrined the independence of the office of Director of Public Prosecutions with regard to the exercise of his functions. The Constitution, however goes on to stipulate the limits within which the DPP must exercise his functions. Sub-article 11 states;

“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 the legal process.”

18. The Constitution therefore put limits to the powers and authority of the DPP in the specific instances mentioned therein at sub-article 11 of article 157.

19. That is public interest, interest of administration of justice and need to prevent abuse of the legal process. The application of the prosecution must therefore be considered in accordance with these constitutional guidelines.

20. From the submissions of learned counsel for the prosecution, during the incident that gave rise to the prosecution of the accuseds, both the complainant and the 1<sup>st</sup> accused were injured. The 1<sup>st</sup> accused was the first person to report the matter of his injury at Ugunja Police Station. He was issued with an OB number which OB number has been declared to the court in these proceedings.

21. That apparently the investigating officers proceeded to arrest 1<sup>st</sup> accused and his witnesses and charge them before court. It has been submitted that this piece of information was not within the knowledge of the DPP at the time the accuseds were charged in court.

22. The side of the complainant have not specifically denied that 1<sup>st</sup> accused had indeed been hurt during the incident and had reported same to the police. Neither have the complainant side specifically denied that 1<sup>st</sup> accused was the first person to report this incident and was duly issued with an OB number.

23. This court forms the opinion that if this incident happened in the manner in which the prosecution alleges (and not denied by the complainant side), then the investigating officers ought to have carried out complete investigations into this matter as to consider the complainant’s and reports made by both the complainant and the side of the accuseds. As it were, it appears the investigations were limited only to the side of the complainant.



24. As submitted by counsel for accuseds, this raises genuine concerns about the rights of the accuseds to fair trial under article 50 and also rights against discrimination and equality before the law under article 27 of the Constitution.
25. Reliance was made on the decision in Joseph Hendrix Waswa v R (2019) eKLR which basically declared the rights to active participation of the complainant in criminal proceedings and also section 20 of the Victim's Protection Act on the rights of victim's tom participate in the trial.
26. Whereas, it has not been demonstrated how the rights of the complainant herein to participate in the criminal trial have been curtailed, it is also the considered view of this court, that such rights of the complainant must be read and be considered alongside those of the accuseds, and the general constitutional powers and authority of the DPP under article 157 as seen above. Particularly, the independence of the Office of Public Prosecution (sub – article 10), the power to discontinue criminal cases (sub – article 8), which powers can only be limited if the DPP falls short of meeting the parameters as set out under sub-article 11 (also seen above).
27. It is also worth considering that the withdrawal sought by the prosecution was made under section 87 (a) of the Criminal Procedure Code. It was made before the close of the prosecution's case. The net effect is that the withdrawal would at best have led to the discharge of the accused. In that event, the accuseds could still (after final investigations) be charged afresh, thereby giving the complainants a right to be heard and to fully and actively participate in the trial.
28. Considering the above circumstances of this case, I am not convinced that the action of the DPP of applying to withdraw the case against the accuseds under section 87 (a) of the Criminal Procedure Code was not in public interest, nor that it was not in the interest of administration of justice. I am equally not convinced that the action of the DPP was meant to abuse the legal process. Had the honorable trial magistrate considered carefully the circumstances of this case, no doubt, the court would have arrived at a different finding and allowed the prosecution application.
29. Section 362 of the Criminal Procedure Code gives this court revision powers over any orders, sentence or findings of any subordinate courts in case of any incorrectness, illegality or impropriety of such orders, findings sentences of such subordinate courts. As already observed above, I am convinced that the orders of the trial court issued herein on March 28, 2023 were incorrect and improper.
30. I allow the application of the prosecution herein dated April 11, 2023, revise and set aside the orders of the Honorable Principal Magistrate issued on March 28, 2023. The case of the accuseds, i.e Ukwala, Principal Magistrate's court, Criminal Case No E082/2022 is marked as withdrawn under section 87 (a) of the Criminal Procedure Code. The accuseds are accordingly discharged.

Orders accordingly.

**D. O. OGEMBO**

**JUDGE**

**6<sup>TH</sup> JULY, 2023**

**Court:**

Ruling read out in court (online) in the presence of Mr. Otieno, Mr. Rakewa for complainant and Ms. Mumu for the State

**D. O. OGEMBO**

**JUDGE**



**6<sup>TH</sup> JULY, 2023**

**Court:**

The original court file to be returned to Ukwala court.

**D. O. OGEMBO**

**JUDGE**

**6<sup>TH</sup> JULY, 2023**

