



**State v Owino (Criminal Case E012 of 2023) [2023] KEHC 21102 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21102 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL CASE E012 OF 2023  
DO OGEMBO, J  
JULY 24, 2023**

**BETWEEN**

**STATE ..... PROSECUTION**

**AND**

**FELIX CHARLES OWINO ..... ACCUSED**

**RULING**

1. This is one of those unique circumstances that any occasionally crop up in criminal trials. The accused person, Felix Charles Owino was charged with Murder contrary to section 203 as read with section 204 of the *Penal Code*. When the charges were read out to him on 3-5-2023, he pleaded not guilty, and the case was fixed for hearing. On the hearing date fixed on 24-7-2023, however, Mr Ronald Okinyo, learned counsel for the parents of the deceased minor, addressed the court first. Counsel submitted that the father and mother of the deceased, Benjamin Ooko Okutu and Everlyne Makokha, respectively, had given him instructions that they had had a meeting as a family and agreed that they do not wish to continue with the case. That they have signed an Affidavit to confirm the position and that whereas the mother of the deceased was not present in court, the father was present and ready to confirm the position.
2. Both Ms Muthami and Mr Nyaberi, counsel for the accused have supported the application of the family of the deceased to have this case withdrawn. Counsel urged the court to consider alternative dispute resolution mechanisms under Article 159 of the *Constitution*, and adopt restorative justice in this case.
3. Ms Mumu, for the Director of Public Prosecutions, has opposed this application. Counsel submitted that the accused has been interfering with the witnesses from the inception of this case. Counsel further submitted on the relationship of 2 others cases were withdrawn at Ukwala Law Courts in which 2 souls had been lost, which withdrawals were as a result of interference with witnesses. And that even in this case, summons had to be issued for the witnesses to come to court. The Prosecution indicated readiness to proceed with 3 witnesses.



4. The applicants denied any relationship between this case and the case at Ukwala Law Courts, nor that accused has ever interfered with any witnesses.
5. From the submissions of the parties, it is clear that the family of the deceased, and supported by the defence sides wants to have this case withdrawn. The Prosecution side, on the other hand is opposed to the withdrawal applied for and wants this case to proceed in the natural way. This brings to issue the issue of withdrawal of criminal cases; of note is that the applicants have not indicated which provision of the law this application is anchored on. Be that as it may, this court gets directions from both the *Constitution of Kenya*.
6. Article 157 (6)(a) of the *Constitution*, gives the Director of Public Prosecution Prosecutorial powers, thus;

“...institute and undertake criminal proceedings against any person before the court (other than a court martial) in respect of any offence alleged to have been committed;
7. And at Substantive (c);

“.....subject to Clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecution under paragraph (b).”
8. The Director of Public Prosecutions is not under any direction or control of anybody or authority in the exercise of his constitutional functions (Sub Article 10).
9. The *Constitution of Kenya*, therefore bestows on the Office of Director of Public Prosecutions, and not any other body or person, the power to withdraw or discontinue a criminal case instituted either by the Director of Public Prosecutions or taken over by it.
10. This position is distinguishable from that in the case cited of *Republic vs Mohammed Abdow Mohammed* [2013]eKLR, since in that case, the application for withdrawal was made by the Prosecution side, and supported by both defence and complainant’s sides. The Prosecution therein exercise its constitutional mandate and authority to discontinue a criminal trial it had commenced whereas in the instant case, the Prosecution is opposed to the intended withdrawal.
11. The applicants have submitted on the applicability and suitability of Alternative Dispute Resolution Mechanism (restorative justice) herein as encompassed in Article 159 of the *Constitution*. Reliance was made on the write up, *Applicability of Traditional Dispute resolution Mechanisms In Criminal Cases in Kenya; case study of Republic vs Mohammed Abdow Mohammed [2013]eKLR*, by the Francis Kariuki. I have gone through the write up. I must say that it is a good discourse on the applicability of alternative dispute resolution mechanisms in criminal cases. The treatise, otherwise does not address the issue at hand herein, the issue of withdrawal of a criminal case by a party other than the Director of Public Prosecutions. The same therefore falls short in shedding any light on the competence of this application.
12. Guided by the express provisions of Article 157 of the *Constitution* on the powers and authority of the Director of Public Prosecutions, I am not persuaded that either the family of deceased (victims) or the defence sides are competent to raise an application for withdrawal of a criminal case in the nature in which this application has been made.



13. The *Victims Protection Act, 2014*, declares the right to information to the victim and also the right to participate in the criminal trial (section 20 was cited). And these rights, have been confirmed by the Court of Appeal (see *Joseph Hendrix Iduswa vs Republic* [2019]eKLR).
14. I however do not find any provision in the *Act*, bestowing on the victim the authority to withdraw or discontinue a criminal trial.
15. The upshot is that I do not find any merit in this application for withdrawal of this case. I dismiss the same and order that this case do proceed in the normal way.
16. It is so ordered.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 24<sup>TH</sup> DAY OF JULY, 2023**

**D.O. OGEMBO**

**JUDGE**

**Court:**

Ruling read out in Open court in the presence of accused, counsel Mr Okinyo, Ms. Muthami, Mr Nyaberi and Ms. Mumu for the State.

**D.O. OGEMBO**

**JUDGE**

7.2023

**Ms. Mumu:**

We are ready to proceed.

**Ms. Muthami:**

We are ready also.

**Court:**

Case to proceed.

**D.O. OGEMBO**

**JUDGE**

