



**Republic v Nderitu & another (Criminal Appeal E063 of 2024)  
[2025] KEHC 13267 (KLR) (24 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13267 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL APPEAL E063 OF 2024  
RM MWONGO, J  
SEPTEMBER 24, 2025**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**FRANCIS GITONGA NDERITU ..... 1<sup>ST</sup> RESPONDENT**

**EDDY GITONGA NDERITU ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**The Charge**

1. The respondents were charged with the offence of grievous harm contrary to section 234 of the Penal Code. The particulars were that on 15<sup>th</sup> September 2021 at Mazzarello market, Kiamuringa sublocation, Mbeti South location in Mbeere South subcounty within Embu County, the respondents jointly with others not before court, unlawfully did grievous harm to Simon Njeru Mughanje.

**Background**

2. When the respondents were arraigned in Court, they pleaded not guilty to the charge. The matter was scheduled for hearing on 21<sup>st</sup> April 2022 and the respondents' Counsel stated that she needed time to go through the statements as she had just come on record. On that date, the court noted that the complainant was absent but it seemed that the parties were pursuing an out-of-court settlement. The matter was adjourned and scheduled for hearing on 14<sup>th</sup> July 2022. On that date, the prosecutor asked for another date because he did not have the police file and the matter was adjourned again without objection.
3. The matter was in court again on 30<sup>th</sup> August 2022, but it did not proceed because the court was on transfer. On 01<sup>st</sup> December 2022, the matter did not proceed because the trial magistrate was unwell. On 23<sup>rd</sup> February 2023, hearing was fixed for 10<sup>th</sup> August 2023. On that date the prosecutor informed



the court that he had one witness, but that the complainant was not present to testify and that he never attends court. The respondent's counsel informed court that the matter was too old and the complainant seemed disinterested in it.

4. The prosecution was granted a last adjournment until 28<sup>th</sup> November 2023. The court did not sit on that day. The matter came up again on 11<sup>th</sup> December 2023 when the complainant was noted to be absent. The prosecutor informed the court that the investigating officer was completely unable to reach the complainant on the phone. That the complainant seemed reluctant to have the matter prosecuted. The prosecutor noted that the court had already given a last adjournment and so he moved to withdraw the case under section 87(a) of the Criminal Procedure Code.
5. The respondents asked the court to release them under a provision of the law whereby they would not be arrested again over the same matter. In its ruling, the court noted that this was a 2021 matter and the complainant had repeatedly failed to attend court. The trial Magistrate noted that the prosecutor's prayer to withdraw the case under section 87(a) of the Criminal Procedure Code was equivalent to seeking an adjournment through the backdoor. The trial court discharged the respondents under section 202 of the Criminal Procedure Code.

### **The Appeal**

6. The State filed a petition of appeal dated 30<sup>th</sup> August 2024 seeking that the appeal be allowed and a retrial be ordered. The appeal is premised on grounds that:
  1. The trial Magistrate erred in law by discharging the respondents under section 202 of the Criminal Procedure Code when the said provision does not provide for a discharge since the complainant who is the Republic was present in court;
  2. The trial Magistrate erred in law by failing to allow the prosecutor to withdraw the case under section 87(a) of the Criminal Procedure Code, yet she had powers to allow the application in light of the reasons advanced that the witnesses had not arrived when the matter was called out but arrived later in court;
  3. The trial Magistrate erred in law by failing to take into account the seriousness of the offence and the views of the victim under the [Victim Protection Act](#); and
  4. The trial Magistrate erred in law and in fact by failing to take into account that the trial court was not sitting on several hearings and the respondents had also caused adjournments in the matter, and therefore the delay in commencing the hearing was not solely attributable to the victim.

### **Parties' Submissions on the appeal**

7. The state relied on section 87(a) of the Criminal Procedure Code which allows the prosecution to withdraw a case without it being a bar to subsequent arrest and prosecution over the same facts. It submitted that when the trial court purported to discharge the respondents under section 202 of the Criminal Procedure Code, this was an error in law because that provision does not provide for a discharge but acquittal. That the withdrawal under section 87(a) of the Criminal Procedure Code would have allowed the prosecution a chance to interrogate the complainant on the reasons for his absence, but this chance was denied.
8. The respondents submitted that the prosecution was aware that the complainant could not be found and that he seemed disinterested in the matter. They relied on sections 202 and 218 of the Criminal Procedure Code and the cases of *Director of Public Prosecution v Benard Koech Kemboi* [2017]



KEHC 7355 (KLR) and Cox & 2 others v Okello [2024] KECA 1693 (KLR) and argued that they are protected from double jeopardy. They submitted that the complainant in a criminal case is the prime witness and without him, the court should acquit the accused or adjourn the case. That the trial court pronounced itself clearly and that decision should be upheld.

### **Issues for Determination**

9. The issue for determination is whether the trial court erred in applying section 202 of the Criminal Procedure Code instead of section 87(a) of the Criminal Procedure Code in the pertaining circumstances.

### **Analysis and Determination**

10. It is necessary that the trial court's record be carefully re-examined in order to determine the issue. In *Kiilu & Another vs. Republic* [2005]1 KLR 174, the Court of Appeal stated thus:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.”

11. From the background of the case, the respondents were arraigned on 20<sup>th</sup> December 2021. They pleaded not guilty to the charge, and were released on specified bail/bond terms. The trial court fixed the case for hearing but, on all occasions when the prosecution was called upon to call its witnesses, the complainant, who is the aggrieved party, was not in attendance. This happened on several occasions and the prosecutor told the court that they did not know why the complainant was absent to testify.
12. From the proceedings, the trial court indulged the prosecution on the same issue on 21<sup>st</sup> April 2022, 14<sup>th</sup> July, 2022 and 10<sup>th</sup> August 2023 and on 11<sup>th</sup> December 2023. On that last date, the prosecution prayed that the respondents be discharged under section 87(a) of the Criminal Procedure Code. The respondents countered this position by telling the trial court that they had been attending court for 2 years without the matter taking off and that it would be fair to be released such that they would not be re-arrested over the same facts.
13. This is when the trial court applied section 202 of the Criminal Procedure Code which provides:

“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.”



14. The appellant has argued in this appeal that the DPP is the complainant and that it was present in court. The Criminal Procedure Code does not provide the meaning of the word ‘complainant’. However, in criminal cases, the State, through the ODPP is the complainant who institutes the proceedings according to section 89 of the Criminal Procedure Code. This means that section 202 applies where the prosecution fails to attend court but the accused persons are present. In that case, the court may acquit such accused persons under that provision.

15. In the case of *Director of Public Prosecution v Ntugu* [2023] KEHC 2630 (KLR), the court found:

“On the first issue regarding the definition of the term “complainant”, it is notable that the same is not defined in the Criminal Procedure Code (Cap 75 of Laws of Kenya). The nearest that the Criminal Procedure Code has come to giving the meaning of the word complainant is under Section 208(1) of the Code which reads as follows:

“(1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).”

13. The Court of Appeal in considering Section 202 of the Criminal Procedure Code dealt with this issue in the case of *Roy Richard Elirema & another v Republic* [2003] eKLR. It thus stated that:

“The parties named in section 202, for example, are the complainant and the accused person. If the “complainant” is aware of the hearing date and is absent without explanation, the Court may acquit an accused person, unless the Court sees some other good reason for adjourning the hearing. The “complainant” in this context has been interpreted to mean the Republic in whose name all criminal prosecutions are brought, and not the victim of crime who is merely the chief witness on behalf of Republic – see, for example, the majority judgment of the Court of Appeal for East Africa in *Uganda v Milenge & another*, [1970] EA 269.”

14. It follows from the above interpretation that the “Republic”, through the office of the Appellant, is the actual complainant in a criminal charge against a particular person or authority or legal entity. Having found so, the next issue is whether the trial court was right to acquit the Respondent under the provisions of Section 202 of the Criminal Procedure Code.”

16. The appellant herein stated that section 202 of the Criminal Procedure Code does not apply to discharge but to acquittal of accused persons and that the proper provision to be applied was section 87(a) which reads:

“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;”



## Conclusions and Disposition

17. From the foregoing, it is clear that there is a distinction between the terms “complainant” and “victim”. The state (prosecution) is regarded to be the complainant who generally institutes prosecutions on behalf of victims. In this case, the state (Complainant) was present, but the victim was not. Thus Section 202 CPC could not apply.
18. The trial magistrate explained in her ruling that the prosecution’s prayer to have the respondents discharged under section 87(a) seemed like they were seeking another adjournment through the backdoor and as such, she declined their argument. Having found that the law recognizes that the complainant is, in fact, the appellant herein, it follows that the trial court fell into error in applying section 202 of the Criminal Procedure Code.
19. In the result, the appeal succeeds and orders are hereby made as follows:
  - a. The order of the trial court discharging the respondents under section 202 of the Criminal Procedure Code is hereby set aside;
  - b. The respondents shall be charged afresh before another court of competent jurisdiction, other than the one that issued the order hereby set aside, for plea taking and expeditious prosecution of the case.
  - c. The said hearing shall be held on a day-to-day basis until concluded.
20. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

.....

**R. MWONGO**

**JUDGE**

Delivered in the presence of:

Ms. Nyika for the Appellant

Both Respondents – Present in Court

Muthama for Respondents

Francis Munyao - Court Assistant

