



**Republic v Simatwa alias Davy (Criminal Case E049 of 2024)
[2024] KEMC 157 (KLR) (14 May 2024) (Ruling)**

Neutral citation: [2024] KEMC 157 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CRIMINAL CASE E049 OF 2024
PA NDEGE, SPM
MAY 14, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

HENRY DAVID SIMATWA ALIAS DAVY ACCUSED

RULING

1. The Accused person herein, Henry David Simatwa Alias Davy is facing a charge of Robbery with Violence c/s 295 as read with 296(2) of the [Penal Code](#). It is alleged that on 14/01/2024 at around 09.00pm at kapkures shopping centre in Nakuru West sub-County within Nakuru County being armed with a dangerous weapon namely a knife, he robbed frankline mboya of his mobile phone make Samsung Galaxy A02 valued at Kshs. 18,000/= and at or immediately after the time of such robbery, he threatened to use actual violence against the said Frankline Mboya. He is also facing an alternative charge of Handling Stolen Goods c/s 322 of the same [Code](#) wherein it is alleged that on 05/01/2024 at the same place, and otherwise than in the course of stealing, he dishonestly retained the same phone, while knowing or having reasons to believe it to be stolen goods.
2. The matter has been pending hearing. On 17/04/2024, the complainant informed the court that he had forgiven the accused person. He informed the court that the accused person's father is currently sick and that that is the reason why he has decided to forgive him.
3. Issues for determination are therefore: -
 - a. Whether this matter can be withdrawn under Section 204 or 176 of the [CPC](#).
 - b. Whether this matter falls within those ambit.
 - c. Whether there should be alternative dispute resolution in this matter.



4. Section 204 of the CPC provides thus:

“If a complainant, at any time before a final order is passed in a case under this Part, satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused.”

Section 176 of the CPC on the other hand gives the court the powers to promote reconciliation in certain instances such as in offences for common assault, or for any other offences of private or personal nature, not amounting to felonies or aggravated in nature.

5. In the case of Kelly Kases Bunjika v Director Of Public Prosecutions (dpp) & Another [2018] eKLR, Muriithi J. listed the Principles that determine the termination of criminal proceedings as;

- a. where criminal charges are terminated by operation of the law where upon death of an accused there is no person to be tried, convicted and sentenced in a trial, there are three ways upon which a criminal charge may be terminated by act of the parties, and it is opportune in this case to discuss the principles involved. A criminal case may be terminated by act of the parties, by reconciliation under section 176 of the Criminal Procedure Code (CPC); withdrawal or discontinuance of the charge by the complainant (S. 204 of the CPC) or the prosecutor (Art. 157 (6) (c) of the Constitution and s. 87 of the CPC); and alternative dispute resolution agreement pursuant to Article 159 (2) (c) of the Constitution. A criminal case may also terminate partly by act of complainant and by operation of the law under section 202 of the CPC, where the complainant fails to attend.
- b. Reconciliation in personal or private cases. In cases of common assault, or any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, section 176 of the CPC allows the Court to promote reconciliation, encourage and facilitate the settlement, in an amicable way, of proceedings, on terms of payment of compensation or other terms approved by the Court. See *Medardo v. R* (2004) 2 KLR 433 and *Shen Zhangua v R*, High Court at Nairobi Miscellaneous Criminal Application 396 of 2006.
- c. Withdrawal of Charge. In accordance with section 204 of the CPC, a complainant may withdraw the complaint before the court makes a fier in the matter and the court has discretion as to whether to allow or reject the withdrawal when satisfied of existence or otherwise of sufficient grounds for permitting such a withdrawal. See *R v Malek Abdulla Mohamed*, High Court at Kisumu No.113 of 1978.
- d. Alternative Dispute Resolution. The court is aware of the persuasive High Court decisions in *R v. Abdow Mohamed* (R. Korir, J.) and *R v. Juliana Mwikali Kiteme* (Dulu, J) where the courts have permitted the termination of serious charges of murder on the grounds that the families of accused and the victim had reconciled. While the Court, respectfully, takes the view that each case shall depend on its circumstances, a general principle may be laid down flowing from constitutional criteria for the prosecution, the withdrawal or termination of criminal cases in terms of Article 157 (11) of the Constitution by which the DPP is obliged to consider “public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”
- e. It must be demonstrated by the accused or the prosecutor who seeks the withdrawal or termination of a criminal case that, in the wording of the Constitution, the discontinuance (read settlement, withdrawal or termination of the criminal case) is justifiable under the parameters of the considerations of public interest, interests of justice and need to



prevent abuse of the legal process. Indeed, in *Juliana Mwikali Kiteme* and *Abdow Mohamed cases*, supra, it was the DPP who made the application for settlement of the cases pursuant to alternative dispute resolution mechanism. See also *Republic v. Faith Wangoi*, Kajiado HC Criminal Misc. Application No. 1 of 2015.

6. From the foregoing principles stated herein, it goes to show how much thought has to be put and things to be considered before a criminal case is withdrawn or terminated from court. Let me start from the viewpoint that the complainant in criminal matters is always the State and that the person who made the complaint to the police is also a complainant but the State takes over on their behalf. This is because criminal matters are brought or instituted with a view to protect the wider public interest and not personal narrow interests.
7. On the issue as to whether this matter falls within the ambit of matters that can be resolved out of court, I find that this matter is a capital offence. But, we must consider the principles that govern Alternative Dispute Resolution, the court takes cognizance of the fact that this can only be done on a case to case basis. The court has to be convinced that this is the best decision and that it is happening in good faith as well. In this particular matter, I do not feel that it will be in the public interest and it would be unfair if the court would blankly decide that we should go for ADR. The principle attached to ADR is from a point of both reconciliation, public interest and fairness. I am not sure whether that would be achieved in this case. The charge herein is a capital offence. The accused is alleged to have been armed with a knife which he used to threaten the complainant. I do not feel that I will be promoting the interest of justice, public safety or fairness to allow the termination of this matter at this stage, for the simple reason that the accused person's father is sick and therefore needs him. From the foregoing, I find the Application lacking merit, therefore, I decline to grant the order of withdrawal/ termination sought at this stage.
8. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 14TH DAY OF MAY, 2024

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of:

Court interpreter: Janet

Prosecution Counsel: Chinga

Accused: Present

Chinga: Praying for a hearing date

CT: Hearing on 09/12/2024 and Mention on 27/05/2024

