



Republic v Hassain (Criminal Case E993 of 2024) [2024] KEMC 57 (KLR) (7 May 2024) (Ruling)

Neutral citation: [2024] KEMC 57 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CRIMINAL CASE E993 OF 2024
PA NDEGE, SPM
MAY 7, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

ABDI KADRI HASSAIN ACCUSED

RULING

1. The Accused person herein, Abdi Kadri Hassan, was on 25/04/2024 charged with the offence of Obtaining Money by False Pretense c/s 313 of the *Penal Code*. It is alleged that on 02/01/2024 at unknown place within the Republic of Kenya, with intent to defraud, he obtained Kshs. 1,000,000/= from Peter Pinjos Njoroge, while pretending that he were in a position to convert the said amount of money into US dollars, a fact he knew to be false and untrue.
2. The prosecution opposed his release on bail pending trial. There is an affidavit of the investigating officer, No. 247259 Paul Ndalo, of Nakuru Police Station, wherein it is deposed that the accused has no physical permanent address within Kenya. That the accused had been arrested in Congo after having disabled his phone. That there are similar charges the accused is facing in Eldoret and Busia, dating back to 2021. That he is therefore a flight risk if released on bail or bond since his bona fide area of residence is unknown. That the suspect was arrested along Malaba- Eldoret enrooting to Uganda.
3. This court then remanded the accused person to await its decision on the bail/ bond application. On 02/05/2024, this court, acting mainly on the serious information in the affidavit, delivered its ruling on bond/bail, where it denied the accused the option of cash bail. The court instead opted for a bond with a Kenyan surety. This was premised on the fact that the accused appeared a vagabond/ vagrant, who could be a foreigner, as stated in the affidavit sworn by the investigating officer during the bail/ bond hearing.
4. This court was thus taken by surprise when soon after the delivery of the ruling, the complainant, with the concurrence of the prosecutions and the investigating officer, pushed for the withdrawal



of the charges so as to permit the filing of a civil claim against the accused for the recovery of the money obtained. There was further an indication that part of the amount obtained herein had been refunded back to the complainant. This court interrogated all the main parties concerned, including the investigating officer who still insisted that the accused person herein is a foreigner and that his place of abode is still unclear. He basically reiterated the contents and averments in his affidavit. Thus, the main issue herein is whether to permit a withdrawal or termination of the proceedings herein, based on all the information furnished before this court.

5. 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.

6. 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.

7. 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.
8. 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.
9. On the issue as to whether this matter falls within the ambit of matters that can be resolved out of court, I find that yes, though complex given the averments in the affidavit filed herein, this matter falls squarely within the ambit as it is not a capital offence. But, we must consider the principles that govern Alternative Dispute Resolution, the court takes cognisance 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. Those averments in the affidavit are weighty and the public interest consideration must be borne in mind herein. 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.
10. From the foregoing, I find the Application lacking merit, therefore, I decline to grant the order of withdrawal/ termination sought at this stage. This court already has information that was availed during the bail/ bond hearing and it is in the interest of justice that this criminal trial proceeds. Any civil action for recovery can proceed concurrently. Accordingly, the application is dismissed.
11. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 07TH DAY OF MAY, 2024

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE



In the presence of:

Court interpreter: Janet

Prosecution Counsel: Chinga

Defense counsel: Cheruiyot

Accused: Present

Victim: Absent

