



**Republic v Oloo & 2 others (Criminal Case E025 of 2022)
[2024] KEMC 64 (KLR) (29 November 2024) (Ruling)**

Neutral citation: [2024] KEMC 64 (KLR)

**REPUBLIC OF KENYA
IN THE MIGORI LAW COURTS
CRIMINAL CASE E025 OF 2022
PA NDEGE, SPM
NOVEMBER 29, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

FREDRICK OTIENO OLOO 1ST ACCUSED

PAUL ODHIAMBO OLOO 2ND ACCUSED

EDWIN ONYANGO OLOO 3RD ACCUSED

RULING

1. The accused persons herein, Fredrick Otieno Oloo, Paul Odhiambo Oloo And Edwin Onyango Oloo (hereinafter referred to as the 1st, 2nd and 3rd Accused respectively) were on 14.01.2022 charged with the serious felony of Grievous Harm contrary to sections 234 of the Penal Code. They all denied that on 05/01/2022, at their home in Got-Kolima Village, Uriri sub-County in Migori County, they willfully and unlawfully did grievous harm to Kennedy Owino, their half-brother.
2. By the time I was taking over the trial herein, 6 witnesses had already testified for the prosecution. They included the complainant herein, PW4, Kennedy Owino Oloo. The typed records of proceedings herein indicate that a counsel, Mr. Oyoo, was engaged by the accused persons herein later on in the trial, and therefore participated in the hearing and cross-examinations of the last two witnesses herein only, i.e. PW5, Collins Omondi, And Pw6, Lilian Awino Oloo.
3. Upon taking over the conduct of the trial herein, on 21.09.2022, this matter came up for directions under section 200 of the Criminal Procedure Code. Whereas the defense counsel was then absent, the accused persons herein, especially the 1st accused, actively and vigorously tried to contemptuously interfere with the administration of justice herein which led to the cancellation or suspension of his bond terms, as he was deemed to be taking advantage of his freedom, to forcefully interfere with the witnesses herein so as to secure what he insisted was an ‘automatic’ but was found to be an unlawful



withdrawal or termination of the proceedings herein without the consent or permission of the court as provided for in sections 87, 176 or 204 of the Criminal Procedure Code.

4. On 07.10.2022, this matter came up for mention to confirm the typing of the proceedings herein so as to enable the hearing process to continue before me. Directions had earlier been taken that the hearing was to continue from where it had stopped. On that day, counsel for the defense, Mr. Oyoo, appeared and made three applications, some of which shall form the basis of this ruling.
5. Counsel first appealed for the reinstatement of the 1st Accused bond terms. He submitted that the accused did not know that by him approaching a complainant for reconciliation, he may rightly be misconstrued to be interfering with the witnesses, especially where the complainant is reluctant to embrace that approach of reconciliation. This application was not opposed by the prosecution counsel, and it also appears to have been overtaken by events, since the complainant on 04.11.2022, stunned the court by his change of mind when he volunteered to reconcile and forgive the accused persons herein whom he stated are his brothers at home. That led to the 1st accused person's bond being reinstated immediately on the same date given that the hostility that existed between him and the complainant appeared to have thawed. The court however did not take it lightly that he could have earlier on deceived the court so as to cancel or suspend the 1st accused's person's bond so as to get an upper hand at the negotiation table.
6. Secondly, counsel prayed that all the witnesses herein be recalled for his cross-examination, mainly because most of them testified before he was engaged by the defense. There was a reference to a previous order of the court that declined to grant a similar application by the defense, but on a careful perusal of the typed proceedings, I have not found such an application having been made and/or determined by this court. Counsel appears to have confused this application to recall, with that which he made on 08/06/2022, when he first appeared for the accused person herein, which was an application to adjourn on account of receiving proper or full instructions.
7. There is also a third application for withdrawal by the complainant herein. The same was made on 04.11.2022 and the ruling on the same was partially made on 08.11.2022, whereafter the same was adjourned to await the typing of the proceedings herein so that the court can find out whether the circumstances can make this court exercise its discretion under section 204 of the Criminal Procedure Code so as to permit the withdrawal as held in *Ceretta Medardo Vrs Republic* [2004] eKLR.

Determination

8. The remaining applications for determination herein are whether to allow the recall of the witnesses herein for counsel's further cross-examination; and whether there are cogent and reasonable grounds to allow the withdrawal under section 204 CPC.
9. Let me start with the second application, whose ruling was partially given on 08.11.2022. As already found therein, withdrawal of complaints under section 204 CPC must only be permitted by the court and on cogent and reasonable grounds. I have gone through the proceedings herein and what could have triggered all these was a land or a boundary dispute between or among the brothers herein. This was a purely family dispute, of a private nature.
10. However, the complainant's earlier statement on oath was to the effect that he was being coerced and forced unduly to withdraw this matter by the 1st accused person, his elder brother. This may be taken to contradict his later application to withdraw which was also made on oath by putting doubt as to whether the withdrawal is genuine, voluntary and free from any force or persuasion.



11. Be that as it may, section 146 (4) of the *Evidence Act* allows the court to permit the recall of any witness for further cross-examination, and in this case, given that the counsel herein was not present during the testimony of most of the witnesses herein, including the complainant, I would have allowed the recall of the witnesses, including the complainant herein for further cross-examination by the defense counsel. That might cause a lot of challenge especially to a complainant who is keen on withdrawing, and I do hereby therefore see no need to decline to allow a withdrawal as applied by him.
12. The consequence is that all the accused persons herein are hereby acquitted under section 204 of the CPC of the offence of Grievous Harm contrary to section 204 of the Criminal Procedure Code. All their sureties herein are hereby discharged and any security deposited herein, on their behalf be released to their respective depositors.

DATED, SIGNED AND DELIVERED AT MIGORI IN OPEN COURT THIS 29TH DAY OF NOVEMBER , 2022

ALOYCE-PETER-NDEGE

PRINCIPAL MAGISTRATE

In the presence of;

Court interpreter: Stephen

Prosecution counsel: Wainaina

Defence counsel: Absent

1st Accused: Present

2nd Accused: Present

3rd Accused: Present

Victim/complainant: Present

