

Court Cr. Rev. 112 of 2025 that was filed on 19th November, 2025.

- 3) That the court in exercising its revisionary powers under Sections 362 and 364 of the Criminal Procedure Code, do revise the order of withdrawal in Nyahururu Cr. Case No. E568 of 2025 Republic v Nathan Jeremiah Nandwah on 6th November, 2025 with a view to satisfying itself as to the correctness, legality, and/or propriety of the said withdrawal of the case.**
- 4) That the court be pleased to review, vary, quash and/or set aside the order of withdrawal in Nyahururu Cr. Case No. E568 of 2025 Republic v Nathan Jeremiah Nandwah issued on the 6th November, 2025 by Hon. S. Mogute.**
- 5) That this court does declare that the conduct of the prosecution, has made it impossible to conduct a fair trial, and the state, through the Respondent herein, be allowed to proceed with the case with the documents in court record and be bound by the decision reached after trial.**

2. The application is premised on grounds that the Applicant was charged on the 28th July, 2025 in Nyahururu CM Cr. Case No. E568 of 2025, Republic v Nathan Jeremiah Nandwah with the offence of **Forgery contrary to **Section 345 as read with Section 349 of the Penal Code.****

3. That the Applicant queried correctness of the charge and the Prosecutor was allowed to withdraw the case under **Section 87(a) of the Criminal Procedure Code** yet such withdrawal without a cogent or tangible reason amounts to a contravention of the same investigations into the allegations, the case having started in 2023 and the prosecution having discovered blunders made hence the application for withdrawal.
4. That the term used 'may' calls for exercise of discretion judicially and without infringing on the rights of a party. That if the police proceeded to arrest the Applicant before the application is heard it would be a denial of the right to be heard.
5. The application is supported by an affidavit deposed by the Applicant where he avers that the court allowed the prosecution to withdraw the application under **Section 87(a) of the Criminal Procedure Code**, a withdrawal that he challenges as the trial court erred in granting the order as his right to fair and expeditious trial was breached.
6. That it is only fair for the Respondents, their officials and especially the DCI-Nyahururu be barred from arresting and/or charging the Applicant with the charges related to **Nyahururu CM Cr. Case No. 568 of 2025.**
7. The Respondents did not file a response to the application and did not turn up during inter-parties hearing but subsequently filed submissions.

- 8.** During hearing the Applicant informed the court that after he appeared in court having initially sued the DPP and was required to amend the application to include the DCI he was arrested and released on a cash bail of Kshs.15,000/- with instructions to appear before the Rumuruti Court on 18th December, 2025 at 8.00am for plea taking. He did present himself before the court as directed and charges similar to the previous ones were read to him but he declined to plead pointing out that he had already moved the High Court for revision. In the result, the Magistrate extended the police bail.
- 9.** That **Section 87(a) of the Criminal Procedure Code** is not absolute hence reasons must be advanced that are tangible, that **Section 87(a) of the Criminal Procedure Code** goes against **Article 48 of the Constitution** which provides that the case be heard expeditiously.
- 10.** The Applicant cited case law. In **Jeremiah Kailika v Republic Meru HCCRA 137 of 2014** where the OCS was barred from arresting, and/or charging the Applicant with charges or complaint relating to **Maua Cr. Case No. 3334 of 2012 Republic v Jeremiah Kailukia** pending hearing of the appeal. the charge was terminated under **Section 87(a) of the Criminal Procedure Code** hence the appeal being instituted.
- 11.** The Respondents through learned prosecution counsel, Ms. Anastacia Mumbi Wanyonyi, in opposing the application submits that the prosecution is empowered by **Section**

87(a) of the Criminal Procedure Code to withdraw any criminal proceedings at any time before judgment is delivered. That it has been held in numerous decisions that the court should not interfere with such withdrawals unless it is shown that there was abuse of process, malice or the withdrawal was unlawful. Reliance is placed on the case of **Karimi v Republic [2013] eKLR.**

12. That as espoused in **Article 50 of the Constitution**, the right to fair trial is guaranteed and the conduct of the prosecution made it impossible to hold a fair trial. That **Section 87(a) of the Criminal Procedure Code** does not violate the right to fair trial as it precedes judgment and thus an accused is not tried or convicted without trial.

13. That it is in the public interest that judicial restraint regarding prosecutorial discretion in line with the principle that the prosecution serves public interest. That the Applicant has not demonstrated cogent evidence of impropriety that would call for interference with the withdrawal.

14. I have considered the application, affidavit in support, annexures thereto and arguments by the Applicant and Respondent. This court has been called upon to exercise its revisional power to examine whether the withdrawal of the case under Section 87(a) of the CPC in the instant matter was valid. In that regard I have scrutinized the lower court record to ascertain that the order made was correct and regular.

15. The Director of Public Prosecutions is vested with power to initiate, take over or discontinue proceedings in criminal matters. This is a constitutional as well as statutory mandate provided for under **Article 157(6) (c) (7) and (8) of the Constitution as well as Section 87 of the Criminal Procedure Code** which provides thus;

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;

b) if it is made after the accused person is called upon to make his defence, he shall be acquitted.

16. This is a case where the 1st Respondent through the learned prosecution counsel re-evaluated the prosecution case, determined it and was of the view that the guidelines on the decision to charge did not support continuation of the matter. The Director of Public Prosecutions is vested with

express powers to initiate, take over or discontinue any criminal proceedings, a constitutional and statutory function.

17. Article 157(6) (c) (7) (8) of the Constitution provides as follows;

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

(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 Prosecutions under paragraph (b).

(7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution's case, the defendant shall be acquitted

(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

18. Article 157(11) of the Constitution in particular provides that;

In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

19. In as much as the DPP has the authority to exercise the powers bestowed upon the office, the discretion in doing so

without any control of other person (s) or authority; the court does not just endorse the decision to withdraw the charges. The court is obligated to ensure justice is done. The withdrawal of the charge must be consented to by the court so that there is no abuse of the process.

20. In **Republic v Izlam A. Omar Cr. Case No. 56 of 2007**, it was held that the court cannot be reduced to merely endorsing the decision by the Attorney General. The power being seized currently by the DPP, the trial court has a duty to ensure justice is done.

21. In **George Taitimu v Chief Magistrate Kibera and 2 Others [2014] KEHC 6173 (KLR)** a case that is persuasive, it was held that;

“Section 87(a) of the CPC gives the learned magistrate broad discretion to accept or reject an application for withdrawal of charges presented by the prosecutor. Such discretion has to be exercised judiciously taking into account the facts of each case and in particular whether the application is brought in the public interest, the interests of administration of justice and the need to prevent and avoid an abuse of the legal process.”

22. In the impugned Ruling the learned trial Magistrate consented to the withdrawal on the grounds that withdrawal of a suit under Section 87(a) of the CPC did not amount to

violation of the rights of an accused and that it was in the interest of justice for the case to be withdrawn.

23. The Applicant argues that the withdrawal contravened his right to fair and expeditious trial. It is not suggested that the reason given was following extraneous purposes by the DPP. The record shows that the case was instituted on 28/07/2025 and withdrawn on 06/11/2025 after evidence of two witnesses was recorded.

24. Article 48 of the Constitution provides thus;

The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

25. The law in respect of the stated Article undertakes to ensure that justice is done to all. It also guarantees that justice is not hindered by procedural, pecuniary and financial hurdles. A withdrawal of a charge under **Section 87(a) of the Criminal Procedure Code** that is grounded in statute consented to by the court before judgment which results into a discharge of the accused does not undermine what is provided for in the Constitution, in fact it supports access to justice. The justice system must be accessible to both the accused and victim(s) therefore discontinuance of a suit, a procedural tool, enhances justice.

26. From the foregoing I find the application lacking merit. Accordingly, it is dismissed in its entirety.

27. It is so ordered.

Dated, signed and delivered virtually this 19th day of January, 2026.

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L.N. MUTENDE
JUDGE