



REPUBLIC OF KENYA



KENYA LAW
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Sang & others v Republic Through the Director of Public Prosecution (Criminal Appeal E015 of 2025) [2026] KEHC 567 (KLR) (29 January 2026) (Ruling)

Neutral citation: [2026] KEHC 567 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E015 OF 2025**

RK LIMO, J

JANUARY 29, 2026

BETWEEN

WILLIAM KIRWA SANG & OTHERS APPLICANT

AND

**REPUBLIC THROUGH THE DIRECTOR OF PUBLIC
PROSECUTION RESPONDENT**

RULING

1. William Kirwa Sang and 11 others have moved this court to review, vary, quash and/or set aside the decision of Chief Magistrate declining to allow withdrawal of Criminal Case No.4907 of 2019. The applicants have invoked the revisionary powers of this court under section 362 and 364 of the Criminal Procedure Code and have asked this court to revise and set aside the ruling made on 19/5/25 vide the above the case.
2. The background of the case itself shows that the applicants in the case pending in the Chief Magistrate's Court faced a total of 9 counts ranging from Arson contrary to section 332(a) of the Penal Code, House breaking contrary to section 304(1) (b), Stealing contrary to section 279(b) of the Penal Code, Malicious damage to property contrary to section 339(1) of the Penal Code, and Stealing stock contrary to section 278 of the Penal Code.
3. The record from the lower court shows that all the accused denied all the counts and the matter proceeded to hearing.
4. The applicants contend that the matter had reached defence stage at which point complainants with respect to counts 1,2,3,4 and 5 withdrew their complaints. That on 19/5/2025 the remaining complainants also expressed desire to withdraw the charges but the court declined and overruled the prosecution from withdrawing the charges.



5. The record of proceedings indicates that the trial in the lower court proceeded before other magistrates but after the charges were amended the case proceeded afresh before Hon S.N. Makila Principal Magistrate on 9/12/2021. After the prosecution's case, the trial court found the accused persons had a case to answer on 4/7/24 and placed them on their defence.
6. On 15/8/24, the complainants in counts 1, 2, 3 and 4 appeared and stated they wished to withdraw their complaints. The court allowed the prosecution to withdraw counts 1,2,3 and 4 which was done on 15/8/2024. The Hon magistrate who was then on transfer then proceeded on transfer and on 30/9/2024 the matter was mentioned before Hon S.M. Mokuia Chief Magistrate and the accused persons through counsel informed the court that they were still involved in alternative dispute resolution and the matter was placed for mention on 31/10/24.
7. On 31/10/24 the prosecution asked the court to fix the matter for defence hearing as the negotiations had failed and defence counsel was absent. The trial court then fixed the matter for defence hearing on 9/12/24.
8. On 9/12/24, the matter came up in court and the prosecution asked for more time to enable parties try and resolve the matter. The trial court asked the parties to avail documents showing that the matter had been resolved amicably and set a mention date for 6/2/25. The matter was mentioned on 24/4/25 when no agreement had been reached. The matter was then slated for 19/5/2025 when the prosecution informed the court that they wished to withdraw counts 5,6 and 7. The court declined the withdrawal stating that the matter had reached defence stage. The defence applied that the court recuses itself and the court obliged and referred the matter to Court 4. Hon Njalale (Court 4) on 5/6/25 found that with the application for withdrawal having been declined in court 1, it was improper for her to review it because of concurrence of jurisdiction and advised the parties to come to this court for review. That is how the matter has landed here.
9. The question before this court is whether the trial court erred in declining to allow for the withdrawal of the remaining counts 6,7,8 and 9. This is because counts 1,2,3 and 4 were withdrawn and the trial court allowed the withdrawal on 15/8/24. For the record the state through the Office of Director of Public Prosecution have conceded to this application for review but this court will determine the issue on merit based on the law.
10. The applicants and the prosecution moved the trial court under the provisions of section 204 of the Criminal Procedure Code to withdraw the complaint. Section 204 of Criminal Procedure Code provides as follows;

“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”.(Emphasis added)

The above provisions in my understanding are not couched in mandatory terms and are therefore not binding to court. A trial court is given latitude or discretion based on grounds given to decide whether to permit withdrawal of the charge or decline it if the reasons advanced are not sufficient.

11. Crimes or offences defined by law are issues that not only affect the individual(s) but also against the society. The Director of Public Prosecution is the custodian of prosecutorial powers donated to it by the people of Kenya under Article 157 of the *Constitution*. The powers are required to be exercised objectively and in the interest of the public. Article 157 (6) (c) 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).

12. The discontinuation of a case is subject to express permission of the court under Article 157(8).
13. Article 157 (11) gives the Director of Public Prosecution guidelines on how to exercise its powers. The provision states;

“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”.

The powers donated to Director of Public Prosecution cannot therefore be exercised in a whimsical manner or on the basis of any other consideration other than public interest and interest of administration of justice.

14. The applicants in this matter fault the trial court for failing to allow the withdrawal and promote reconciliation. But at the hearing of this application I challenged the applicants’ counsel to reconcile their contention with the provisions of section 176 of the Criminal Procedure Code and he could not. Section 176 of the Criminal Procedure Code provides as follow;

“In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated”. (Emphasis added)

It is apparent from the above provisions that while the courts can allow withdrawal of certain criminal cases to promote reconciliations, the law limits the withdrawals to common assaults and other minor offences but offences of aggravated nature like rape and other felonies are not within the bracket of offences that can be permitted to be withdrawn to promote reconciliation. Before a court allows an application to withdraw it has to consider the nature of the offence and the reasons advanced for withdrawal. That is the purpose or objective of the discretion given to the trial under section 204 of the Penal Code and Article 157 (8) of the *Constitution*. A trial court is given the overall power in order to ensure that justice is dispensed fairly and objectively.

15. Now this court has perused through the charge sheet with respect to the counts or offences for which the accused are charged and for which they have been found to have a case to answer. The charge sheet dated 18/3/21 indicated the applicants have cases to answer with respect to count V (Arson contrary to section 332 (a) of Penal Code) Count VI (malicious damage to property contrary to section 339(1) Penal Code), Count III (Stealing contrary to section 268 of Penal Code), Count VIII (Arson contrary to section 332(a) Penal Code) and Count IX (House Breaking contrary to section 304 (1) (b) and Stealing contrary to section 279 (b) of the Penal Code).
16. The provision of section 4 of the Penal Code defines a felony as “an offence which is declared by law to be a felony or, if not declared to be a misdemeanor, is punishable without proof of previous conviction with death or imprisonment for 3 or more”.

When you look at the offences in Count (V) to (IX) it is apparent that they are all felonies punishable by imprisonment of 3 years or more.



17. The trial court cannot therefore be faulted for declining to permit the withdrawal of the counts particularly given that the court on 9/12/2024 asked the parties to avail documents indicating that there was a mutual agreement between the complainants and the accused persons.
18. In the premises this court finds that the trial court's refusal to permit withdrawal under section 204 was legal and sound. This court does not find good basis or sufficient reasons to review or set aside the decision of Hon S.M. Mokuia made on 19/5/25. I direct that the case does proceed before another court because Hon Mokuia had recused himself.

DELIVERED, DATED AND SIGNED AT KITALE THIS 29TH DAY OF JANUARY, 2026.

HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Ruling delivered in open court

In the presence of

Wanyonyi for the Applicant

Mugun for the Respondent

Duke/Chemosop- Court assistants

