



**Kibalachi v Director of Public Prosecution (Constitutional Petition
E022 of 2024) [2026] KEHC 1298 (KLR) (11 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 1298 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CONSTITUTIONAL PETITION E022 OF 2024**

RM MWONGO, J

FEBRUARY 11, 2026

**IN THE MATTER ARTICLES 20(1)(2)(4), 21(1), 22(1),
48, 258(1) OF THE CONSTITUTION OF KENYA**

**AND IN THE MATTER OF THE ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 25(A)(C),
27(1)(2), 28, 29(D)(F), 50(1)(2)(P) OF THE CONSTITUTION OF KENYA 2010**

AND

ARTICLE 23(1) AS READ WITH ARTICLE 165 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF CONSTITUTIONALITY OF
SECTION 87(A) OF THE CRIMINAL PROCEDURE CODE**

BETWEEN

ABRAHAM GORDON KIBALACHI PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

JUDGMENT

The Amended Petition

1. The petitioner's petition dated 16th September 2024 and amended on 24th March 2025, seeks the following orders:
 - a. A declaration that Section 87(a) of the Criminal Procedure Code is unconstitutional as it is inconsistent with Articles 10, 20(1)(2)(4), (21,25 (a) (c), 29(d), 50 (2) and 159(2) of *the Constitution*;



- b. A declaration that the constitutional rights of the Petitioner have been violated by the decision to bring fresh charges against him after withdrawal of the original charges;
 - c. An order that the Respondent's decision to charge the Petitioner for a second time based on the same facts while he is still mentally unfit is a violation of his rights under *the Constitution*; and
 - d. Costs of this Petition.
2. The petitioner grounded the petition on the strength of the court's jurisdiction under Articles 22(1) and 258(1) of *the Constitution*. He claimed that his rights under Articles 10, 20(1-4), 21(1), 22(1), 23(1), 25(a), 27(1-2), 28, 29(d&f), 48, 50(2), 50(2), 54(1)(a), 157(11), 159(2), 165(2)(b) and 258(1) were violated. That the provisions of section 87(a) of the Criminal Procedure Code were misapplied in his case and he now seeks to challenge the constitutionality of the said provision. He stated that the provision affects his right to fair trial given that he may be re-arrested and charged with the same offence and under the same facts.
 3. He adds that failure to consider the prevailing circumstances of the case while considering a re-arrest will subject him to mental torture and will result in no closure at all. That even if Section 87 CPC were to be constitutional, the question would still remain as to the constitutionality of the Respondent's actions since the same were in contravention of various Articles of *the constitution* including Articles 50, 157(11) and 159(2) thereof.
 4. The petitioner was charged in Embu Criminal Case No. E398 of 2022 but plea taking was deferred severally owing to the petitioner's mental status as he was found to be unfit to plead. The petitioner was subjected to various mental assessments but the conclusion remained the same, a circumstance that led the respondent to withdraw the proceedings under section 87(a) of the Criminal Procedure Code.
 5. He contended that having been found unfit to stand trial, he should be protected from future fresh charges based on the same facts by rendering the provision of Section 87 of the CPC unconstitutional. He stated that the actions by the Respondent are unconstitutional as the withdrawal of the charges were based on failure by the prosecution to proceed with trial in light of the Petitioner's health yet new evidence of sound mind has been availed to warrant fresh charges.
 6. The petitioner's wife filed an affidavit in support of the petition. She deposed that the petitioner's mental state is volatile and the illness is triggered by his surroundings. That the petitioner is on treatment and there is an improvement although psychotic outbursts are unavoidable. She produced 6 medical reports indicating that the petitioner is unfit to plead, which circumstances led to withdrawal of the charged he was facing in Embu MCCR E398 of 2022. According to her, the petitioner is still belabored by a mental illness, and therefore to subject him to another case, namely, Embu MCCR E588 of 2024 would amount to abuse of the respondent's power and his constitutional right to fair trial.

Replying Affidavit

7. In its replying affidavit, the respondent stated that the petitioner is entitled to the rights under Articles 48 and 27(1) of *the Constitution*. That Section 87(a) of the Criminal Procedure Code is not inconsistent with *the Constitution* and that the DPP was not barred from reinstating the charges. It stated that the applicant has not provided any recent documents to show that he is still under the same medical condition or that he has deteriorated. That the applicant is not mentally incompetent as he was able to instruct his advocate, showing that he has rational understanding of the proceedings. That the mental examination report does not reveal any mental illness and on the contrary it shows that the applicant is mentally competent to take plea.



8. The respondent further asserted that, if the applicant is competent enough to serve the public as Officer in charge of a police station, there is no reason why he claims to be incompetent to take plea. Regarding the findings from the medical reports, the respondent deposed that the mental conditions arising therein are treatable with medicine and counselling, and this should not hinder the proceedings.
9. The state deposed that it has not been given a chance to interrogate the alleged medical reports and, in any event, there is no provision of *the constitution* that demands that an accused person be subjected to mental assessment. That section 11 of the Penal Code creates a presumption of sanity unless the contrary is proven, that if insanity is proven, then the provisions of section 162-167 of the Criminal Procedure Code are duly invoked. It urged the court to let it exercise its prosecutorial powers without the same being limited.

Parties' Submissions on the Petition

10. The petition was canvassed by way of written submissions.
11. The petitioner relied on section 3A(3) of the *Mental Health Act* and the cases of BN v Republic [2019] KEHC 4011 (KLR) and Hassan Hussein Yusuf v Republic [2016] KEHC 2860 (KLR). He argued that he deserves protection against being subjected to criminal proceedings since he is suffering from a mental condition. It was his submission that Section 87(a) of the Criminal Procedure Code opens the door for limitless prosecution on the same facts; and that this violates article 157(11) of *the constitution* which requires the DPP to act in the public interest towards administration of justice and to prevent abuse of legal processes.
12. That the impugned provision does not limit the number of times when an accused person may be re-arrested and charged and no reasons for withdrawal may be given. He also relied on the cases of Geoffrey Andare v Attorney General & 2 others [2016] KEHC 7592 (KLR), Julius Kamau Mbugua v Republic [2010] KECA 109 (KLR) and Transcend Media Group Limited v Independent Electoral and Boundaries Commission [2017] KEHC 9137 (KLR).
13. On its part, the respondent submitted that the DPP is entitled under Article 157(6)(c) of *the Constitution*, to discontinue criminal proceedings at any time before judgment. In this case, it chose to do so under section 87(a) of the Criminal Procedure Code. It relied on the case of Titus Koome Kubai, Julius Kithinji Meeme & Paulo Kobia v Director of Public Prosecutions [2015] KEHC 4007 (KLR) where the court found that Section 87 (a) CPC, the impugned provision, was not unconstitutional.
14. Further reliance was placed on the case of Irene Wambui Muchai, Gladys Thitu Gakinya, Josephat Mbugua Njoroge, Francis Ndegwa Njoroge, Teresiah Wanjiru Njuguna & Mary Wanjiku Njoroge v Attorney General [2017] KEHC 8895 (KLR) where the court examined what would amount to torture. The respondent urged that withdrawal of charges under section 87(a) of the Criminal Procedure Code is not a bar to reinstatement of the charges. It also relied on the case of Anarita Karimi Njeru v Republic [1979] KECA 12 (KLR) where the court urged that a petitioner must disclose specific violations of his rights to allow the court to consider the orders sought.

Issues for Determination

15. The issue for determination is whether the petitioner has made out a sufficient case to declare section 87(a) of the Criminal Procedure Code unconstitutional.



Analysis and Determination

16. The background of the matter is that in 2022 the Respondent instituted charges against the Petitioner in Embu MCCR E398 of 2022. The respondent withdrew the case against the petitioner in the said Embu MCCR E398 of 2022, under section 87(a) of the Criminal Procedure Code. That section provides:

“87 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;”
(Emphasis added)

17. The respondent then instituted charges against the petitioner in Embu MCCR E588 of 2024 based on the same set of facts and on the strength of the above cited provision. The Petitioner then applied to the Court to stay the said proceedings. This court, through a ruling delivered on 13th November 2024, issued a conservatory order staying proceedings in Embu MCCR E588 of 2024 pending hearing and determination of the petition herein. In the petition, the petitioner is challenging the constitutionality of section 87(a) of the Criminal Procedure Code. He argues that he should not be subjected to a second charge over the same set of facts owing to his mental illness. He states that the provision is inconsistent with Articles 10, 20(1)(2)4), (21,25 (a) (c), 29(d), 50 (2) and 159(2) of *the Constitution*.

18. The strength of the petitioner’s petition lies essentially in the issue of his mental illness. The trial court indulged the petitioner in Embu MCCR E398 of 2022 and carefully considered the issue of mental illness. It was guided by the findings of the court in *Kimaru & 17 others v Attorney General & another; Kenya National Human Rights and Equality Commission (Interested Party) (Petition 226 of 2020) [2022] KEHC 114 (KLR) (Constitutional and Human Rights) (1 February 2022)*.

19. The Court ordered that several tests be conducted and reports be filed and this was done. The mental assessment reports were considered and the trial Magistrate, on 2 separate occasions, ordered that the petitioner be sent to a specified medical facility for further treatment for 3 months before ascertaining whether plea could be taken. Eventually, further medical assessments disclosed that the petitioner was still unfit to plead. At that point, the prosecution prayed to withdraw the charges under section 87(a) of the Criminal Procedure Code and the prayer was allowed on 28th August 2023.

20. Under the charge sheet dated 12th July 2024 in Embu MCCR E588 of 2024, the petitioner was charged with unlawful wounding contrary to section 237(a) of the Penal Code; a charge which he had faced before.

21. Article 157 of *the Constitution* establishes the Office of the Director of Public Prosecutions and empowers it to do, inter alia, the following;

“The Director of Public Prosecutions shall exercise State powers of prosecution and may:

- 6(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." [Emphasis added]
22. The constitutional and statutory mandate of the respondent includes the power to withdraw or discontinue a matter under section 87(a) while reserving the right to charge the suspect for the same offence under the same facts. This provision of the Criminal Procedure Code safeguards against double jeopardy so that a person discharged thereunder will not suffer twice for the same cause. The 9th Edition Blacks Law Dictionary defines double jeopardy as "The fact of being prosecuted or sentenced twice for substantially the same offense." This is why discharge under the impugned provision is considered and allowed before an accused person is placed on his defense.
23. Both Article 157(6)(c) of *the Constitution* and Section 87(a) of the Criminal Procedure Code clearly open the door for the respondent to withdraw a charge at its discretion, with the consequences of such withdrawal being very clear in law. In fact, Section 87(a) of the Criminal Procedure Code stems directly from *the Constitution* and it is consistent with it. In the petitioner's case, the question of his mental capacity to plead was sufficiently argued and considered by the trial court which made many concessions before allowing the charge to be withdrawn.
24. The mental capacity of an accused person is a matter reserved for determination by the trial court and none other. The fact that the trial court in Embu MCCR E398 of 2022 exhaustively considered that issue and allowed withdrawal of the charges in that matter closes that case. In the result, there was a reservation for reopening that case at the respondent's discretion. In the subsequent case, Embu MCCR E588 of 2024, the trial court will have the opportunity to consider the issues of the accused's mental capacity afresh and reach its own finding because it is a central issue in a fresh case before that court.
25. In my view, the petitioner's determination of mental incapacity to plead which resulted in withdrawal of the case in Embu MCCR E398 of 2022, does not mean that section 87(a) of the Criminal Procedure Code is unconstitutional. In fact, the opposite is true. That provision aligns with Article 157 of *the Constitution* which generally entitles the accused the right to a fair hearing in a scenario where discontinuance of the case is opted for. In *Titus Koome Kubai, Julius Kithinji Meeme & Paulo Kobia v Director of Public Prosecutions* (Supra), the court declined to declare section 87(a) unconstitutional and stated thus:
- "This court was also invited to declare Section 87 (a) of CPC as being unconstitutional. The court was not given any good reason why the said section should be declared unconstitutional. In my view, Section 87 (a) of CPC must be read with Article 157 (8) and (11) of *the Constitution* which provides the purview under which the courts should exercise their discretion. If properly exercised, taking into account the special circumstances of each case, there is nothing unconstitutional about the section."
26. The Court in *Anarita Karimi Njeru v Republic* [1979] KEHC 30 (KLR) stated that where a constitutional violation is sought, it is imperative that the petitioner does distinctly and with particularity point it out to a constitutional court for determination. In this case, there is no particularity of the basis for violation and no clear case of violation of the petitioner's rights by



virtue of the respondent's re-opening of the case following its withdrawal. As already pointed out, the withdrawal is under a constitutionally aligned and underpinned provision.

Disposition

27. In light of the foregoing discussion, it is my considered view that the petition must be, and is hereby dismissed in its entirety as it lacks merit. Accordingly, this court hereby vacates the order issued on 13th November 2024, staying proceedings in Embu MCCR E588 of 2024, and orders that the respondent shall forthwith carry on with its lawful duties in that case.
28. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 11TH DAY OF FEBRUARY, 2026.

R. MWONGO

JUDGE

Delivered in the presence of:

Petitioner not Present

Andande for Petitioner

Ms. Mwaniki for the Respondent

Francis Munyao - Court Assistant

