



**Republic v Ondiek & 2 others (Criminal Case E2049 of 2024)  
[2025] KEMC 341 (KLR) (28 October 2025) (Ruling)**

Neutral citation: [2025] KEMC 341 (KLR)

**REPUBLIC OF KENYA  
IN THE NAKURU LAW COURTS  
CRIMINAL CASE E2049 OF 2024  
PA NDEGE, SPM  
OCTOBER 28, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**PC ABSALOM ONDIEK ..... 1<sup>ST</sup> ACCUSED**

**PC HILLARY MWIGAI ..... 2<sup>ND</sup> ACCUSED**

**CI REBECCA OWENDI ..... 3<sup>RD</sup> ACCUSED**

**RULING**

1. The 1<sup>st</sup> Accused person herein, PC Absalom Ondiek, was on 17/09/2024 charged with the offence of Attempted Murder c/s 220(a) of the Penal Code. It is alleged that on 07/07/2022 at Ngata area, Menengai sub-County within Nakuru County, he willfully and unlawfully attempted to cause the death of PC Brian Onyango by shooting him using a firearm make Ceska pistol registration number F7231.
2. The 2<sup>nd</sup> Accused person, No. 254730 PC Hillary Mwigai, and the 3<sup>rd</sup> Accused person, No. 236081 CI Rebecca Owendi, have, on the other hand, been separately charged with the offence of Conspiracy to Defeat Justice c/s 117(a) of the same Code. It is alleged that on 24<sup>th</sup> and 25<sup>th</sup> January, 2023, while at IPOA offices Nakuru town within Nakuru County, while recording their statements, they respectively gave misleading information to the investigating officers in an attempt to cover up the shooting of PC Brian Onyango which happened on 07/07/2022 at Ngata area within Nakuru County.
3. The hearing of the prosecution case has progressed substantially, and the prosecution has already called 3 witnesses. The accused persons and the complainants are or were police officers all working at Menengai police station, under the command of the 3<sup>rd</sup> accused. On the day of the alleged shooting, as particularized in the 1<sup>st</sup> count, they were in an operation when the 1<sup>st</sup> accused is alleged to have shot the complainant, thereby seriously wounding him.



4. The defence being raised at the cross-examination stage, is that the shooting could have been accidental as there was a prisoner who was involved. During the cross-examination, the complainant alleged that the 1<sup>st</sup> accused person, who could have fired the shot was his good friend. That in such an operation, there was a possibility for an officer to be injured by a colleague. The investigations herein were being conducted by IPOA.
5. When the matter came up for further hearing of prosecution case on 25/06/2025, the complainant applied on oath that he wanted to withdraw the complaints herein. Because of the nature of the case, I called on the parties herein to submit on the application by the complainant to withdraw the complaints herein.
6. Mr. Mongeri, learned counsel for the defence, submitted that the High Court has always agreed with the idea of reconciliation in all criminal matters before it. That parties herein are officers who have reconciled and the court need to exercise its discretion in their favour and have these proceedings terminated. Mr. Mongeri, cited the case of *Ondieki v Office of the Director of Public Prosecutions* (Miscellaneous Criminal Application 19 (E020) of 2023) [2023] KEHC 19162 (KLR) where the High Court held that complainant should be allowed to exercise his right pursuant to Section 204 of the Criminal Procedure Code without unnecessary bureaucracy so as to promote the spirit and purport of Article 159(2) of *the Constitution* on promoting alternative dispute resolution mechanism and ensuring that justice is not delayed which is in essence one of the elements of fair trial.
7. Thus, the main issue herein is whether to permit a withdrawal or termination of the proceedings herein, based on all the information already before this court. I further frame the finer issues for determination as follows: -
  - 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.
8. 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.”
9. 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.
10. In the case of *Kelly Kases Bunjika v Director of Public Prosecutions (dpp) & Another* [2018] eKLR, Muriithi J. discussed in details the instances and Principles that determine the termination of criminal proceedings as follows:
  - 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.... 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 final order 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*.
11. 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.
  12. 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, 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 cognizance 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 find that there could have been a serious wounding incident involving the use of firearm officially assigned to one of the accused person herein. All the parties herein are adults and officers from the same station. They were friends, colleagues and in an operation. They are all adults of sound mind and as such, this matter cannot be said to be a public interest case. It would have been a public interest case, if at all a civilian was



involved. Such a complainant, as the complainant herein, who alleges to have suffered personal physical pain and on his own free will and unequivocally says he wants to withdraw the complaints and that he will not in future reinstate the charges, fully understands the consequences of such withdrawal. As held by the High Court in Ondieki vrs Office of the Director of Public Prosecutions, supra, he should be allowed to exercise that right pursuant to Section 204 of the Criminal Procedure Code without unnecessary bureaucracy. The High Court in the case went on to state as follows: \_

“The gains for Alternative Dispute Resolution mechanism cannot be overemphasized. It promotes cohesion and peace between the parties unlike the adversarial court hearing. It is also cheaper and reduces case backlog.”

13. As aforesaid, the victim and the Accused are said to be colleagues and even friends. The complainant can however only withdraw the charges with respect to the offence of Attempted Murder, in count 1, which only applies to the 1<sup>st</sup> Accused person. As for the charges of Conspiracy to Defeat Justice c/s 117(a) of the Penal Code against the 2<sup>nd</sup> and 3<sup>rd</sup> accused as charged in counts 2 and 3, I find that the complainant therein is the State. A victim such as the complainant herein, can only withdraw complaints in charges where he is a direct complainant.
14. The Court of Appeal in Roy Richard Elirema & another v Republic [2003] eKLR had this to say on a complainant for purposes of the Criminal Procedure Code;

“The parties named in section 202, for example, are the complainant and the accused person. If the “complainant” is aware of the hearing date and is absent without explanation, the Court may acquit an accused person, unless the Court sees some other good reason for adjourning the hearing. The “complainant” in this context has been interpreted to mean the Republic in whose name all criminal prosecutions are brought, and not the victim of crime who is merely the chief witness on behalf of Republic – see, for example, the majority judgment of the Court of Appeal for East Africa in Uganda v Milenge and another, [1970] EA 269. In that case, the Court dealt with the role of a public prosecutor as follows: -

“It is essential to consider the powers of a public prosecutor such as the State Attorney in this case. The first elementary principle is that he is the person who decides what witnesses to call and that he, at any rate, at the trial, has complete control of the prosecution in court. He can at any stage of the prosecution close his case and call no further evidence,”

15. I do therefore find that only the valid complainant in the first count has come forward and been allowed to withdraw the complaints which directly relate to him, and they are those that are in the first charge, and consequently do hereby permit the said withdrawal under section 204 of the Criminal Procedure Code. The charge relate to the 1<sup>st</sup> accused person only and I consequently therefore acquit the 1<sup>st</sup> Accused of the offence therein, i.e. Attempted Murder c/s 220(a) of the Penal Code.
16. Hearing shall therefore proceed for the remaining accused persons, the 2<sup>nd</sup> and 3<sup>rd</sup> accused persons with regards to their respective counts. Meanwhile the cash bail paid for the 1<sup>st</sup> accused, be released to the depositor.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 28th. DAY OF October, 2025.**

**ALOYCE-PETER-NDEGE**

**SENIOR PRINCIPAL MAGISTRATE**



In the presence of:

Court interpreter: Janaet

Prosecution Counsel: Macharia

Defense counsel: N/A

1<sup>st</sup> Accused: Present

2<sup>nd</sup> Accused: Present

3<sup>rd</sup> Accused: Present

Victim: Absent

Macharia: We take a date for the remaining accused.

