



REPUBLIC OF KENYA



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**Kinuthia & 3 others v Republic (Criminal Appeal E021 of 2025) [2026] KEHC 5640 (KLR)
(Anti-Corruption and Economic Crimes) (29 April 2026) (Judgment)**

Neutral citation: [2026] KEHC 5640 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES**

CRIMINAL APPEAL E021 OF 2025

REA OUGO, J

APRIL 29, 2026

BETWEEN

**DESMOND IRUNGU KINUTHIA 1ST APPELLANT
NELSON KARANJA KINUTHIA 2ND APPELLANT
ENKEI HOLDINGS LIMITED 3RD APPELLANT
ANNETTE MWANGI 4TH APPELLANT**

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Ruling delivered at Milimani Anti-Corruption
Criminal Case No. 28 of 2019 Republic vs. Stephen Ndung'u Kinuthia & 19
Others, by Hon. Z.W. Gichana, Senior Principal Magistrate on 30th October 2025)*

JUDGMENT

1. The Appellants were jointly charged, alongside others, in Milimani Anti-Corruption Criminal Case No. 28 of 2019 with 13 counts of various offences under the [Anti-Corruption and Economic Crimes Act](#) 2013. The Office of the Director of Public Prosecutions then filed an Application dated 10th July 2025 seeking to withdraw the charges against the 4th Appellant herein, Annette Mwangi, who was the 2nd Accused; Ephantus Kahiru Kahwae, the 4th Accused; Desmond Irungu Kinuthia, the 8th Accused and 1st Appellant; Nelson Karanja Kinuthia, the 9th Accused and 2nd Appellant; Charmine Njeri Kinuthia, the 10th Accused; Florence Waithira Kinuthia Wangui, the 11th Accused; Jane Kinuthia, the 12th Accused; and Enkei Holdings Limited, the 20th Accused and 3rd Appellant.



2. In a Ruling delivered on 30th October 2025, the trial court allowed the Application in part, ordered the withdrawal of the charges against the 10th, 11th and 12th Accused persons, but declined to allow the withdrawal of the charges against the 2nd, 4th, 8th, 9th and 20th Accused persons.
3. Aggrieved by this decision, the 1st-3rd Appellants in this Appeal filed the present Petition of Appeal dated 12th November 2025, seeking the withdrawal of the criminal charges under Section 87(a) of the Criminal Procedure Code, pursuant to the DPP's Notice of Motion application dated 10th July 2025. They have raised seven (7) grounds of Appeal as follows:
 1. The Appeal is against the ruling/decision of the subordinate court (Hon. Z. W. Gichana (SPM) delivered on 30.10.2025 pertaining to refusal by the Learned Magistrate to allow withdrawal of charges against the Appellants as was prayed by the DPP in the DPP's Notice of Motion application dated 10.7.2025.
 2. The Learned Magistrate erred in law and fact in holding that the charges against the Appellants were based on conspiracy and common intention contrary to the charges against the Appellants as framed in the Charge Sheet.
 3. The Learned Magistrate erred in law and fact in holding that the application for withdrawal could not be countenanced without running the risk of abusing the court process on account of the charges being crimes of conspiracy and common intention contrary to the charges against the Appellants as framed in the Charge Sheet.
 4. The Learned Magistrate erred in law and fact by misinterpreting the doctrine of common intention while arriving at the impugned ruling/decision.
 5. The Learned Magistrate erred in law and fact and descended into the arena of the parties by making a finding of common intention in the impugned ruling/decision where none had been pleaded and/or urged by the DPP in the proceedings.
 6. The Learned Magistrate's finding of common intention against the Appellants is premature, predetermined and/or prejudicial to the Appellant's defence/case in the ongoing proceedings.
 7. The Learned Magistrate erred in law and fact in disallowing the application to withdraw charges against the Appellants without any basis whatsoever.
4. Subsequently, the 4th Appellant filed an amended Petition of Appeal dated 18th February 2026 under Section 350 of the Criminal Procedure Code, in which she raised five grounds of appeal as follows:
 1. That the learned Magistrate erred in law and fact in holding that the Ethics and Anti-Corruption Commission (EACC) had locus standi to address the court on the withdrawal of charges by the Office of the Director of Public Prosecutions (ODPP) against the Appellant, whereas the said Commission lacked constitutional authority to oppose or participate in the exercise of prosecutorial discretion reserved exclusively to the ODPP under Article 157 of *the Constitution* of Kenya, 2010.
 2. That the learned Magistrate erred in law and fact by giving the EACC locus before the Honourable Court interfered with the ODPP's constitutional mandate to exercise independent discretion over matters presented before it. This went against the constitutional powers vested upon the Office of the Director of Public Prosecutions under Article 157 of *the Constitution* of Kenya 2010 to withdraw charges without interference or control from any person or body.



3. That the learned Magistrate erred in law and fact by failing to withdraw charges against the 4th Appellant solely based on the ground that she was charged alongside others with conspiracy to commit an offence of corruption whereas each accused person stands on their own evidentiary footing.
 4. That the learned Magistrate erred in law and fact by failing to appreciate that the mere joinder of parties in a charge of conspiracy does not render their legal or evidentiary positions inextricably bound, and that the withdrawal of charges against one accused does not ipso facto prejudice or defeat the case against the remaining co-accused.
 5. That the ruling therefore is erroneous, based on wrong principles of law and thereby occasioning manifest miscarriage of justice.
5. The Appeal was canvassed by way of written submissions. The 1st, 2nd and 3rd Appellants' submissions dated 6th March 2026 and the 4th Appellant's submissions dated 17th April 2026.

The Submissions

6. The 1st, 2nd and 3rd Appellants submitted on two issues: Whether the Learned Magistrate erred in declining withdrawal of charges against the Appellants on account of conspiracy charges, and Whether EACC has locus standi to participate in Milimani Anti-Corruption Criminal Case No.28 of 2019 and/or continue appearing in the matter. Counsel submitted that the trial court's decision to deny the DPP's Application to withdraw the case against the Appellants solely on the grounds that they were charged with 'conspiracy and common intention' was legally wrong for three reasons.
7. The appellants submitted that, at first instance, the trial court's conclusion was factually inaccurate because they were never charged with conspiracy, as that charge was contained in a separate count involving different people.
8. Secondly, the appellants submitted that the Ruling was premised on a prejudicial pre-judgment, in that it was premature for the trial court to conclude that 'common intention' exists at an interlocutory stage before the trial is finished. Counsel stated that it is trite law that a court is forbidden from making definite and conclusive findings of law or fact before a matter is heard, as doing so would prejudice the hearing and determination and contravene the presumption of innocence. Counsel cited the Court of Appeal decision in Patriotic Guards Ltd vs. James Kipchirchir Sambu (2018) eKLR to emphasise the importance of safeguarding the right to a fair trial.
9. Thirdly, it is argued that the trial court erred by rendering an inconsistent decision, allowing the DPP to drop charges against other co-accused who were also jointly charged, while denying the same to the Appellants. It is further argued that this determination was both contradictory and baseless.
10. On the second issue, the appellants submitted that the EACC lacks legal standing (locus standi) to participate in the DPP's decision to withdraw the case. Counsel argued that the Ethics and Anti-Corruption Commission (EACC), which opposed the withdrawal, had no legal right to be involved in the prosecution phase of the case because Article 157 of *the Constitution* grants the DPP constitutional independence and absolute autonomy to institute or withdraw prosecutions in the public interest. Consequently, the DPP does not need permission from, nor is it controlled by, the EACC or any other body. The High Court decision in Geoffrey K. Sang vs. DPP & 4 Others (2020) KEHC 9213 (KLR) was cited in support.



11. It was further submitted that the DPP noted that the investigations failed to establish the Appellants' knowledge of or participation in the offences, and therefore the intended charges failed the public interest test.
12. The appellants further submitted that the EACC is not a victim under the [Victim Protection Act](#), and asserted that established case law demonstrates that a 'victim' must be a natural person (a human being). They also argued that the 'complainant' in a criminal case is the Republic, represented exclusively by the DPP. They argued that the EACC is merely a constitutional commission, and cited the High Court decision in *Petroleum Instituted of East Africa vs. Republic & 2 Others* (2022) KEHC 12799 (KLR), Section 2 of the [Victim Protection Act](#) and Section 329A of the Criminal Procedure Code for the definition of a victim, alongside the Court of Appeal's decision in *Roy Richard Elirema & Another vs. Republic* (2003) KECA 165 (KLR), where the court distinguished between a victim and a complainant.
13. The appellants cited Article 79 of [the Constitution](#), which establishes the EACC, and the EACC Act Cap 7H, which, under Section 13, outlines the EACC's powers and duties. It is further submitted that the EACC's legal mandate ended upon completing its investigations and handing the file to the DPP. Accordingly, allowing the EACC to act as a victim representative while also serving as the investigator creates an unconstitutional conflict of interest, particularly given that the EACC failed to file the mandatory Victim Impact Statements. Counsel urged the Court to allow the appeal, set aside the magistrate's ruling, and formally bar the EACC from participating in the proceedings, thereby leaving the DPP free to withdraw the charges.
14. The 4th Appellant raised two issues: whether the learned magistrate erred in law and fact in holding that the Ethics and Anti-Corruption Commission (EACC) had locus standi to address the Court; and whether the learned magistrate erred in law and fact by failing to withdraw the charges against the 4th Appellant on the ground that the charges were crimes of conspiracy and common intention. The appellant submitted that the trial court erred in allowing EACC to participate in the proceedings without locus standi, stating that it had no legal right to oppose the DPP's application in court.
15. The appellant argued that the DPP enjoys constitutional independence under Article 157 of [the Constitution](#) and that the DPP has absolute, exclusive authority to decide whether to institute, continue, or discontinue prosecutions, without requiring anyone's permission or direction. Conversely, the EACC's mandate is strictly limited to investigations and to making recommendations to the DPP, so that once the investigation file is handed over, the EACC's legal role in the case ends. The appellant cited the cases of *Roy Richard Elirema & Ano vs Republic* (2003) eKLR and *Ahmed Rashid Jabril & Another vs. DPP* (2020) eKLR.
16. It was further submitted that the EACC cannot claim the right to participate as a victim or a victim's representative because the [Victim Protection Act](#) strictly defines a victim as a 'natural person' or a human being who suffered injury. Instead, the EACC is a state agency and therefore cannot claim the procedural rights reserved for actual victims. The trial court's refusal to withdraw the charges solely because the 4th Appellant was charged with offences of 'conspiracy and common intention' was a serious misapplication of the law. Further, the DPP conducted a review and concluded that there was no evidence that the 4th Appellant participated in or benefited from the crime, as her only role was to co-sign a single memorandum in 2013.
17. It was also submitted that criminal liability is severable, so each accused person must be judged on their own actions. Consequently, joint charges do not prevent the DPP from dropping charges against one individual. It is further submitted that by forcing the 4th Appellant to stand trial simply because



she was co-charged, the magistrate effectively made a premature finding of guilt, thereby violating her constitutional right to be presumed innocent until proven otherwise.

18. The appellant submitted that the memorandum in question was also co-signed by a senior officer, Mr. Justus Ongera, who was not charged. Therefore, singling out the 4th Appellant while ignoring the co-signer was discriminatory and arbitrary. It is their position that forcing a trial when the prosecution itself admits the evidence is insufficient is an abuse of the court process, oppressive, and a waste of judicial resources. The Court is urged to overturn the magistrate's ruling and allow the charges to be withdrawn.
19. As this is a first appeal, I am mindful of the duty of a first appellate court, as espoused by the Court of Appeal at Kisumu in the case of Patrick Analo & another vs. Republic [2019] KECA 162 (KLR), thus:

“To the extent that we are dealing with a first appeal, we are obliged to re-evaluate the evidence and come to our own independent conclusion. This Court expressed that duty as follows in Attorney General & 2 Others v. IPOA & 2 Others, CA. No. 324 of 2014.”

Analysis And Determination

20. After considering the grounds of appeal and the parties' rival submissions on the law, I find that the only issue for my determination is whether the Appeal is merited.
21. This Appeal was triggered by the subordinate court's decision to decline the Application by the Director of Public Prosecutions (DPP) to withdraw criminal charges against the above-mentioned Appellants in the ongoing anti-corruption case. It is not in dispute that the same Ruling allowed the DPP to withdraw the charges against some co-accused, namely the 10th, 11th and 12th Accused persons. The Appellants herein raise issues of locus standi of the EACC in opposing the Application and challenge the trial court's decision, stating that it violates many legal principles, including the presumption of innocence, individual criminal liability, consistency in decision-making, and interference with prosecutorial powers and independence guaranteed by *the Constitution* and statute.
22. The office of the Director of Public Prosecutions is an independent office established under Article 157(1) of *the Constitution*. That provision, together with Section 5 of the ODPP Act, sets out the powers and authority of the ODPP and outlines how those powers shall be exercised. It provides as follows: -
 - (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
 - a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
 - b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
 - 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.



- (9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.
 - (10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.
 - (11) 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.
 - (12) Parliament may enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.
23. It therefore follows that the ODPP cannot be directed, controlled or instructed by any body, person or authority in the discharge of its functions. It is also clear from the above provisions that the ODPP has the power to withdraw any previously instituted criminal prosecution if it deems it fit. However, this can only be done with the permission of the Court. The powers of the ODPP must not be exercised whimsically but should be exercised with due regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.
24. The Supreme Court of Ireland explained the powers of the ODPP and the leeway to exercise them within appropriate legal confines in the case of *Carlin v. DPP*, Appeal No. 105/2008; (2010) (IESC) 14, thus:
- “7. The Director is an important independent office in the State and independent in the performance of his functions: Prosecution of Offences Act, 1974. A clear policy of non-intervention by the courts in the exercise of the discretion of the Prosecutor, except in particular circumstances, has been stated in cases over the last few decades. An independent prosecutor is an important part of the fabric of a fair justice system. The Prosecutor must not only be independent but be seen to be independent. If the Director is seen to change his decision where there are no new factors but simply after representations by a victim or his family, it raises issues as to the integrity of the initial decision and the process, and thus may impinge on confidence in the system. It is important that a prosecutor retain the confidence of society in his process of decision making.
 8. It is entirely appropriate that the Director have a process wherein he may review an earlier decision. The fact that he may review his decision is now a matter in the public domain.
 9. It is essential that the Director remain independent. However, he is subject to the constitutional requirement of fair procedures....”
25. Therefore, it is well established that the decision to prosecute or not rests solely with the ODPP. The power to prosecute can be exercised in several scenarios:
- a. cases where a new look at the original decision shows that it was wrong, and, in order to maintain confidence in the criminal justice system, a prosecution should be brought despite the earlier decision;



- b. cases which are stopped so that more evidence which is likely to become available in the fairly near future can be collected and prepared. In these cases, the prosecutor will tell the accused that the prosecution may well start again;
- c. cases which are stopped because of a lack of evidence but where more significant evidence is discovered later; and
- d. cases involving a death in which a review following the findings of an inquest concludes that a prosecution should be brought, notwithstanding any earlier decision not to prosecute.

(See Odunga J. in Machakos High Court JR Misc. Application No. 21 OF 2020 Talib Zein Salimin and Ano vs. Energy & Petroleum Regulatory Authority and 2 Others, Daniel Gichuhi and 2 Others Interested Parties).

26. From my reading of the trial court’s record, it is clear that the application by the ODPP was instituted pursuant to Section 87 (a) of the Criminal Procedure Code which provides as follows: -

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.”

27. The decision to allow the withdrawal of charges or criminal proceedings against an accused person must be made in light of the wider interests of the administration of justice and the need to avoid abuse of the court process. For a court to determine whether to allow such an application, it must pay due regard to the circumstances of the case and the reasons advanced by the Prosecution for seeking a withdrawal at that stage, before judgment is rendered. I rely on the case of *George Taitumu vs. Chief Magistrate Court, Kibera & 2 others* [2014] eKLR, where the Court stated: -

“Section 87(a) of the Criminal Procedure Code gives the learned magistrate broad discretion to accept or reject an application for withdrawal of charges presented by the prosecutor. In light of Article 157(11) of *the Constitution*, 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 interest of administration of justice and the need to prevent and avoid an abuse of the legal process.”

28. Thus, the court cannot arbitrarily deny the ODPP permission to withdraw a case; the matter must be determined judiciously. I have considered the reasons advanced by the trial court in declining the prayer to withdraw the charges against the Appellants herein. The Ruling states that the Appellants faced charges jointly with others, that the charges were based on conspiracy and common intention, which meant they were ‘conjoined at the hip’ or connected, and that withdrawing the case against them would likely cause an abuse of the court process. In other words, it would likely restrain the court’s ability to determine the cases against the other remaining accused persons who were charged jointly alongside the Appellants. In other words, the trial court implies that withdrawing the charges against the Appellants would collapse the case against the remaining co-accused, rendering the hearing that had significantly progressed, with 23 witnesses having testified, superfluous and a waste of the court’s time. This, to me, is not something that ought to be concluded at this stage, especially where 20 witnesses are yet to be called.



29. Further, my view of the above reasoning is that there was no plausible justification for the trial court to decline to grant the prayers sought by the ODPP. As already stated, it is the ODPP who bears the mandate to review the evidence and determine whether it is sufficient to found a charge.
30. In addition, while conspiracy and common intention create a connection among co-accused, each charge remains distinct and personal to the individual. The Criminal Procedure Code recognises that withdrawal or discontinuance under Section 87(a) can be applied selectively, without collapsing the entire case. At the same time, the said section provides that a charge can be reinstated against an accused person if the prosecution comes upon further evidence that can withstand or form the basis of the criminal charges. The prosecution must prove participation and mens rea for each accused. If the evidence against one Appellant collapses, continuing to prosecute them solely because others remain charged violates the constitutional right to a fair trial under Article 50 of *the Constitution*. Withdrawal in such circumstances, as prayed for by the ODPP, is not an abuse but a safeguard against wrongful prosecution.
31. In a criminal trial, criminal liability or culpability must be proved against each accused individually. Therefore, withdrawal against one does not automatically prejudice the prosecution of others. Article 157 (8) provides that the Prosecution must justify withdrawals, and the court retains discretion to reject any such request if there is any evidence of bad faith. Where withdrawal is grounded in evidentiary insufficiency or the public interest, it strengthens rather than undermines the integrity of the proceedings. To presume abuse merely because charges are joint is speculative and contrary to the principle that justice must be based on evidence.
32. Lastly, *the Constitution* guarantees the right to equal protection of the law and to freedom from arbitrary prosecution. Denying withdrawal merely because the charges the Appellants faced alongside others were “conjoined at the hip” undermines these rights.
33. In conclusion, I find that the trial court’s decision to deny the ODPP’s prayer for leave to withdraw the charges against the Appellants, while allowing the same for the other accused persons, was not only inconsistent but also legally unsustainable. Withdrawal of a case is a constitutionally recognised prosecutorial discretion, subject to judicial oversight, and does not automatically collapse the case against the remaining accused. I further find no evidence of bad faith on the part of the ODPP in seeking to withdraw the charges against the Appellants, nor any risk of undermining the public interest.
34. In conclusion, I find that the Appeal is merited and hereby allow it. Accordingly, I order as follows: -
1. The order refusing withdrawal of the charges against the Appellants, being 2nd Accused, 8th Accused, 9th Accused and 20th Accused herein in Milimani Anti-Corruption Criminal Case No. 28 of 2019, is hereby set aside and substituted with an order allowing the DPP to withdraw the said charges.
 - (2) Each party is to bear its costs of the proceedings.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THE 29TH DAY OF APRIL 2026.

R.E. OUGO

JUDGE

In the presence of:

Mr Midenga -For the 1st , 2nd and 3rd Appellants

Mr Kaifa h/b Miss Njeri For the 4th Appellant



Mr. Walusala For the Respondent

Adan/ Minah C/A

