

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL NO. 27 OF 2017

REPUBLIC.....APPLICANT
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VERSUS

AMOS **AKITELA**
AWOI.....APPLICANT

Coram: Before Justice R. Nyakundi

M/s Sidi Kirenge for the State

RULING

1. In Kenyan law, a party has the liberty to withdraw an appeal but it must be done through formal procedures, usually via a notice of withdrawal or a substantive application to the Court particularly before the judgment is delivered. The Criminal Procedure Code allows of cases/appeals often hinge on Section 87(a) of Section 204 of the Criminal Procedure Code.
2. The legal principles are as affirmed in the following cases:

Withdrawal under Section 87(a) CPC (Prosecution):

- ***Republic v. 1st Interested Party [2022] KEHC 1628***: The High Court reviewed a case where the DPP withdrew charges against an accused under S. 87(a) of the CPC, allowing for the discharge of the accused, but not as a permanent bar to future prosecution.
- ***James [2020] KEHC 7626 (Criminal Appeal No. 46 of 2018)***: Discusses that section 87 of the CPC provides for the withdrawal from prosecution in trials before subordinate courts, which can occur at any time before judgment is pronounced, provided the court consents.
- ***Republic v. Nicholas Kamwanjara Mwatha & 2 others [2020] (Criminal Appeal No. 5-2020)***: Explains the distinction between

withdrawals and dismissals for non-attendance (s. 202/206 of the CPC), highlighting that an acquittal is often the result of improper or final withdrawals, as noted in the official case document.

Withdrawal under Section 204 CPC (Private Person/Complainant):

- ***Republic v. Kibera Criminal Case No. 4153 of 2016 (2017) eKLR [2017] KEHC 9195***: Examines the situation where a complainant tries to withdraw a case under Section 204 of the CPC, which the High Court noted is subject to the overriding constitutional duty of the DPP under Article 157(6)(c) to take over and continue, or stop, criminal proceedings.

Withdrawal of Appeals in Higher Courts:

- ***SC Petition No. 21 of 2015 [2015] KECA (Court of Appeal)***: While focusing on withdrawal *before* judgment is delivered, the Court noted that parties have the liberty to withdraw an appeal under Rule 96 of the Court of Appeal Rules before it is fully heard, as stated in the Supreme Court document.

3. It is settled law that is subsumed in the Constitution and the Criminal Procedure Code that empowers a Director of the Public Prosecution or any other duly authorized prosecutor under Article 157(5), (6), (7), (9) & (10) to withdraw the charges before a trial Court before the Accused has pleaded or on appeal in which event the Accused who had been acquitted or convicted is bound by the primary orders. The instant appeal the Director of Public Prosecution through his agents was aggrieved with the decision of the trial Court and therefore preferred an appeal. However, for reasons beyond their administrative control the Accused who had been acquitted was never traced so that they can be served with a notice of the memorandum of appeal. It will be a remiss of this Court not to underscore that a fair trial in terms of Article 50 of the Constitution does list procedural rights in sufficient detail requiring the Respondent to receive adequate notice and facilities to prepare for his defence on appeal. That is how the appeal for many years was being mentioned to

confirm the presence of the Respondents who was an accused person in the trial Court but the efforts by the Prosecution hit a dead end.

4. The central reason in my view goes to the nature of the criminal justice system itself in principle, the textual approach is that the system aims to punish only those persons whose guilt has been established in a fair trial. In the appeal at bar, the Accused who was presumed innocent was tried publicly so that the trial can be seen to satisfy the substantive requirements of a fair trial under Article 50 was finally acquitted by the trial Court. This necessitate the Director of the Public Prosecution to ride on the protocol of an aggrieved party who has a constitutional right of appeal to pursue the specified elements in the memorandum of appeal so that justice can be done or be seen to be done on the matter on behalf of the public.
5. In our constitutional democratic landscape sustaining the rule of law the concept of justice itself is broad and protean concept. In considering this concept within the purposes of this case lies at the heart of a fair trial in the field of the criminal justice system in Kenya may it be at the trial Court's forum or at the appellate level. The Courts should bear in mind that dignity, freedom and equality remain to be the foundational values of our Constitution as espoused in Article 10, 27, 28 & 29 of our Charter. That is the very reason why this concept if this appeal was to proceed in the absence of the Respondent that could have been a procedural defect which is fatal to the administration of justice.
6. For those reasons, I was persuaded to grant leave to the Director of Public Prosecution to withdraw the appeal for there were sufficient grounds for permitting it. The consequence of this is to have the files opened for purposes of appeal litigation closed *sine die*. It is so ordered.

**DATED, SIGNED AND DELIVERED VIA CTS AT ELDORET THIS 11TH DAY
OF MAY 2026.**

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R. NYAKUNDI

JUDGE