



**Republic v Waswa & another (Criminal Case 7 of 2018)
[2025] KEHC 1162 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1162 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL CASE 7 OF 2018
AC MRIMA, J
FEBRUARY 28, 2025**

BETWEEN

REPUBLIC STATE

AND

DAVID NANGENDO WASWA 1ST ACCUSED

JOSHUA KWEMOI TRIKOI 2ND ACCUSED

RULING

1. This ruling is in respect of an application by the State to withdraw the case against the accused pursuant to Article 157(6) of *the Constitution*. Briefly, the accused herein, David Nangendo Waswa and Joshua Kwemoi TrikoI were charged with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code* whose particulars were that on the night of 22nd/23rd Day of March 2018 at John Power farm in Chorlim sub location within Trans-Nzoia County jointly with others not before Court murdered Agnes Chepakaptul.
2. The Accused were arraigned in Court on 4th April 2018 for plea taking where they both denied the charges and were to be tried. The first prosecution witness took to the stand on 8th May 2019. On 1st July 2019, the Court adjourned the hearing to 30th September 2019. On the said date, the hearing was adjourned to 29th October 2019. Thereafter, the hearing could not proceed for various reasons until 20th February 2020 when PW2 testified. Subsequently, there were challenges tracing the rest of the witnesses. On 16th February 2021, Mr. Omwena, Learned Prosecutor for the State informed the Court that he had no witnesses. A year later, on 22nd February 2022, Mr. Omwena was still in the same predicament. He stated as follows;

There are no witnesses in this case.



3. On 18th May 2022, Ms. Kiptoo, Learned Counsel for the Prosecution also had no witnesses facing the same setback obtained on 20th September 2022, and on 1st November 2022. On 23rd May 2023, the prosecution procured one witness but the Defence Counsel was indisposed. The case finally got traction on 13th February 2024 where PW3 testified.
4. As it would turn out, on 3rd October 2024, the prosecution sought to withdraw the case on the basis that the witnesses could not be traced despite the Investigating Officer's best efforts. Counsel informed the Court that no meaningful evidence would be on record without the witnesses they intended to call. It was its case that it had correctly invoked Article 157 of *the Constitution* with a view to withdraw the case and urged this Court to allow the application such that at the opportune time, justice would be rendered to the victim's family.
5. From the foregoing discourse the only issue for determination is whether the circumstances of the case meet the constitutional and jurisprudential threshold for withdrawal of a criminal case before the High Court.
6. Article 157(6)(c) of *the Constitution* empowers the Director of Public Prosecutions to discontinue a prosecution at any stage before judgment is delivered. However, the prosecution must seek the Court's permission to do so. It 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).
7. Article 157(7) of *the Constitution* provides further that;

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. With the foregoing, this Court will now turn its focus on what superior Courts have said in respect to withdrawal of cases. In *Republic -vs- Simon Okoth* [2017] eKLR, Ngugi J. (as he then was) made useful remarks on the test that must be met before the withdrawal of a case. The Court observed: -
 15. This tripartite test stipulated in Article 157(11) must be viewed together with the other principles laid out in Article 157. Seen as such, I have derived at least five principles which the Court should evaluate in considering an application to withdraw criminal charges. These are:
 - (a) The rule of law principle underpinning the discretion of the DPP to prosecute criminal cases without undue influence, direction or control by any other authority;
 - (b) The need to protect accused persons from violation of their fundamental rights and freedoms through unwarranted criminal prosecution;
 - (c) The need to ensure that the criminal process of the court is not abused to further or defeat private interest which are, or should be, the subject of civil proceedings or for other improper purposes;
 - (d) The public interest in either the continuation or discontinuation of the criminal prosecution including consideration of whether criminal prosecution is a proportionate response to the facts at hand;



- (e) Wider interests in the administration of justice including considerations of the impact of the prosecution on the community and the precedential effects of the decision to continue or discontinue the prosecution.
9. Having combed through the entire proceedings, it is clear the sole challenge was that of securing crucial witnesses. The failure cannot be attributed to undue influence, external influence or control. The prosecution, on more than four occasions spanning a period of 5 years requested for adjournments since it could not reach and secure witnesses.
10. In view of the fact that the accused were first arraigned in Court in 2018, it is in the interest of fair administration of justice and in keeping with the tenets of fair trial as provided for under Article 50 (2)(e) of *the Constitution* that the accused are not perpetually held in Court awaiting the prosecution to find the witnesses.
11. The Court in *Republic -vs- Simon Okoth* [2017] eKLR spoke to the unfairness visited upon the accused when hearing could not progress at the instance of the prosecution. It observed thus;
21. It has now been four years and ten months since the incident took place and since the Accused Person took plea. She has been in custody since then. Four years and ten months is a long time to be in custody awaiting trial. Four years and ten months is a long time to attempt to trace witnesses. Indeed, it would seem that the chances of locating the witnesses diminish with the passage of time. In the circumstances, the Prosecutor is right in not seeking to continue with the criminal trial. Four years and ten months is a long time set against the fair trial rights guaranteed in Article 50(2)(e) of *the Constitution*. Four years and ten months are an especially long time to spend in custody if there is no timeline for trial because there is no indication of if and when the witnesses might be located. Four years and ten months is enough time for the Prosecution – and the Court -- to conclude that there is no reasonable likelihood that the prosecution will ever be able to trace the witnesses or present any evidence in the case which could lead reasonably lead to a conviction.
12. In this case, it has been more than 6 years since the trial begun. Only three witnesses, far between each other and whom the prosecution, are of the view, hold no crucial evidence, have so far testified. The challenge to get the ones to secure a conviction persists. The guiding principle is that once the prosecution opines that there is no realistic prospect of securing a conviction, it may apply for a withdrawal.
13. According to the publication by the Office of the Director of Public Prosecution entitled ‘Guidelines of the Decision to Charge, 2019’, the prosecution ought to arrive at a decision to withdraw in instances where: -
- i. It becomes clear during the trial that the evidence adduced cannot sustain a conviction. This can include where prosecution witnesses repeatedly fail to attend court and the prosecutor is satisfied that they had been given sufficient notice.
- ii. The continuation of the case has become undesirable due to exceptional circumstances such as serious sickness of the accused person or a key witness.
14. An acquittal in the circumstances of this case is not tenable since the prosecution had not closed its case. The prosecution may reinstate the case in the future. In the premises, this Court finds that the prosecution has made out a case to warrant the withdrawal of the case within the confines of Article 157(6)(c) of *the Constitution*. This Court, in fulfilment of its obligation under Article 157(8), has oversighted the process and is satisfied that the withdrawal is merited.



15. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and later elected to the Judicial Service Commission thereby mostly being away from the station. Apologies galore.
16. In the end, the following final orders hereby issue.
 - a. Kitale Criminal Case No. 7 of 2018 is hereby withdrawn.
 - b. The accused persons are hereby discharged from the charge of Murder and are hereby set at liberty unless otherwise lawfully held.
 - c. For avoidance of doubt, the discharge of the accused persons shall not operate as a bar to subsequent proceedings against them on account of the same facts.
17. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2025.

A. C. MRIMA

JUDGE

Judgment delivered virtually in the presence of:

Mr. Mugun, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.

No appearance for Miss. Mwemeke, Learned Counsel for the Accused.

Duke – Court Assistant.

