



**Republic v Ngunju & another (Criminal Case E077 of 2024)  
[2025] KEHC 12026 (KLR) (Crim) (30 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 12026 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL CASE E077 OF 2024  
AM MUTETI, J  
JULY 30, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**SIMON KIMANI NGUNJU ..... 1<sup>ST</sup> ACCUSED**

**IAN NJUGUNA GIKONI ..... 2<sup>ND</sup> ACCUSED**

**RULING**

1. The Director of Public Prosecutions by way of a Nolle prosequi sought to terminate the proceedings in this case.
2. The two accused persons were jointly charged for the offence of murder under Section 203 as read with 204 of the *Penal Code*.
3. The Director of Public Prosecutions through MS Dela prosecution counsel informed the court that the state had decided to discontinue the proceedings in the spirit of promoting alternative forms of Justice system of resolving disputes.
4. The Nolle prosequi was filed in court on 4<sup>th</sup> June 2025 duly signed by Ms Gikui Gichui Senior Assistant Director of Public Prosecutions for the Director of Public Prosecutions.
5. The Nolle Prosequi was anchored on the provisions of Article 157 (6) (c) and 157 (9) of the *Constitution* of Kenya as read together with Section 5 of the *Office of the Director of Public Prosecution Act* No 2 of 2003.



6. Ms Gikuhi also cited the Legal Notice No 12186 of 6<sup>th</sup> October 2022 as the instrument delegating power officers within her rank and file to exercise the authority of the Director of Public Prosecution in relation to discontinuance of Criminal proceedings.
7. The Notice prosequi was accompanied by a letter dated 3<sup>rd</sup> June 2025 in which the officer invoked the provisions of Article 159 of the Constitution as well as the Judicial policy of Social Transformation through Access to Justice (STAJ) which encourage adoption of alternative forms of justice as means of settling legal disputes in this country.
8. The withdrawal of the proceedings according to MS DELA prosecution counsel was preceded by consultation between the ODPP and the family of the deceased.
9. The deceased's father indicated to the office of the Director of Public Prosecutions that the family had resolved to forgive the two accused persons over the death of the deceased.
10. The two accused persons are both relatives of the deceased with the 1<sup>st</sup> accused said to be a brother of the deceased and the 2<sup>nd</sup> Accused a cousin of the deceased.
11. The father of the deceased was said to be traumatized by the death of his son in the hands of his own brother and cousin.
12. According to Ms Dela any further proceedings in thus matter would traumatize the family further and in the Director of Public Prosecution's view the termination of the case would promote the peaceful and harmonious co- existence in the family.
13. It is further argued that the decision to terminate the matter is not repugnant to justice and morality. It was further argued that the end of the day the family would be left reconciled and healing would start bringing a closure to the family.
14. The court was informed that the deceased was unmarried and did not leave behind any child thus his most affected people are the parents.
15. The advocates appearing for the two accused supported the application by the state.
16. The court has exercised its mind over the matter and assessed whether the reasons advanced by the Director of Public Prosecutions align with the greater goals of justice.
17. Article 157 (6) provides :-

Director of Public Prosecution

1. There is established the office of Director of Public Prosecutions.
2. The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President.
3. The qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a judge of the High Court.
4. The Director of Public Prosecutions shall have power to direct the InspectorGeneral of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.
5. The Director of Public Prosecutions shall hold office for a term of eight years and shall not be eligible for reappointment.



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.
18. The Article leaves no doubt that the Director of Public Prosecutions has the constitutional power and authority to terminate Criminal Proceedings instituted by the office or by any private prosecution.
19. The authority of the Director of Public Prosecutions is only subject to oversight by the court through the window provided for under Article 157 (8) of the *Constitution* which requires the Director of Public Prosecution to seek permission of the court whenever he desires to terminate proceedings.
20. The requirement by the *Constitution* for the Director of Public Prosecutions to seek permission of the court is to ensure that there is no abuse of process and that the power awesome as it is, is exercised with objectivity and in line with the principles espoused in the Article 10 of the *Constitution* on accountability, transparency and integrity.
21. The integrity of the criminal justice system must be jealously guarded to ensure that the guilty do not unjustly escape punishment and the innocent are not unfairly subjected to the rigors of a criminal trial which can at times be very distressing and destructive to one's life and career.
22. The objective of Article 157 (8) is certainly not to unfairly impede the Director of Public Prosecution in the discharge of his constitutional mandate but is to ensure that decisions that are taken in relation to termination of criminal proceedings are objective and meet the ends of justice.
23. The introduction of Article 157 (8) in Constitution of Kenya 2010 was meant to cure the mischief that Kenyans had experienced with the Article 26 of the former constitution where the Attorney General



who then doubled up as the Director of Public prosecutions would exercise the power to enter Nolle Prosequi in the most -opaque manner and without regard to the public interest more so in cases that had some political considerations in them.

24. The power of the Court under Article 157 (8) must however never be interpreted to mean that the Director of Public Prosecution's decision to withdraw must be with the concurrence of the court.
25. All that court needs to satisfy itself, is that on an objective assessment of the reasons advanced by the Director of Public Prosecution in his request to terminate a matter, there is a prima facie sound basis for the Director of Public Prosecution's move to terminate the proceedings. The clause was inserted to avoid whimsical entry of nolle prosequi and withdrawal of cases without reasonable cause.
26. The court must resist the temptation to unnecessarily decline to grant leave or "permission" as is expressed in the Constitution to the Director of Public prosecution for the functions of the Director of Public Prosecutions call for exercise for termination of proceedings at times even on account of public interest concerns. The intervention by the courts is only meant to ensure that prosecutorial discretion is lawfully and rationally exercised. The separation of powers must be respected and the courts must never seek to decide who is to be prosecuted for that would fly in the face of the provisions of Article 157 (10) of the Constitution and offend the doctrine of separation of powers. See Mohit v The Director of Public Prosecutions of Mauritius [2006] WLR 3343 {2006} UKPC 20
27. The Director of Public Prosecution is only required to give reasons and it is precisely those reasons that the court must objectively look at and determine whether leave should or should not be granted to withdraw.
28. The court must always bear in mind that the primary responsibility to prosecute remains with Director of Public Prosecutions and only intervene where it is manifestly clear that the Director of Public Prosecutions is acting outside the constitutional expectation of independence in the discharge of his prosecutorial mandate and that his actions do not meet the constitutional yardstick set under Article 157 (11) of the Constitution.
29. If the court is persuaded that the exercise of the Director of Public Prosecution's power is not in the public Interest or that it does not further the interests of justice then leave to terminate, withdrawal or discontinue may be declined.
30. The court must however uphold the doctrine of separation of powers where each agency of government is allowed room to discharge its constitutional mandate without a due interference.
31. In Doctors for Life International v Speaker of the National Assembly and others (CCT12/050 [2006] ZACC II where Ngcobo J speaking for the majority stated as follows:

"The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the institutions by which power can be exercised'.. ..... But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament 'must act in accordance with, and within the limits of, the Constitution', and the supremacy of the Constitution requires that 'the obligations imposed by it must be fulfilled'. Courts are required by the Constitution 'to ensure that all



branches of government act within the law' and fulfil their constitutional obligations. This Court 'has been given the responsibility of being the ultimate guardian of the Constitution and its values'. Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that 'the obligations imposed by [the Constitution] must be fulfilled'. It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution."( emphasis mine).

32. This court has on the basis of the above position in law considered the application by the Director of Public Prosecution seeking to discontinue the matter at hand.
33. Firstly, I must commend counsel for having brought this application at this early stage in the proceedings considering that the two accused persons are in custody.
34. This court has insisted that where accused persons are in custody prosecution must be undertaken with some greater degree of urgency and similarly any applications to terminate or withdraw must be made promptly in order to obviate the danger of keeping persons who are presumed innocent in custody for long only to withdraw the matter long after a person has been in remand for a long period.
35. The true spirit of Article 50 of the Constitution of a fair and expeditious trial must be upheld throughout the trial.
36. The fact that the accused persons have been charged and placed in custody to await trial must always act as a constant reminder to all the players in the trial that the accused person's right to liberty has been temporarily suspended and that everything must be done timeously to avoid delay.
37. The prosecution has pleaded with the court to grant the request to discontinue the matter on what they say are considerations borne out of the provisions of Article 159 (2) (c) of the Constitution which recognizes the application of alternative forms of dispute resolution including reconciliation.
38. The court has taken note of the fact that this is a matter that involves close family members. The deceased and the 1<sup>st</sup> accused are said to be brothers and the 2<sup>nd</sup> accused happens to be their cousin.
39. The court did not get to hear details of how the incident leading to the murder arose but since the court has before it the bundle the prosecution would have relied on, this being a court of record, I have taken liberty to go through the bundle to satisfy myself that this is a matter where reconciliation can be considered as an alternative form of dispute resolution.
40. The prosecution should note that in future where there are suggested forms of alternative justice mechanism or dispute resolution an affidavit should be filed in order to furnish the court with adequate information and material to consider before leave can be granted by the court.
41. The practice will promote accountability and transparency which are important Article 10 requirements in exercise of constitutional powers by any agency of government or public official.
42. The state in this case provided a statement from the 2<sup>nd</sup> accused Ian Njunguna and a reading of the statement reveals that the three young men were out on a drinking spree in the evening they deceased died.
43. No doubt from the statement the three fought culminating into the deceased suffering fatal injuries in the process.
44. The facts do not reveal any aspect of premeditation on the part of the accused before the Commission of the offense.



45. The decision by the state to promote reconciliation in this matter is in this court view sound and in line with the spirit of Article 159 (2) (c) of the Constitution as well as the court policy of promoting alternative justice mechanisms.
46. This is a sad case of a father who is about to suffer a double loss of their sons all because of their indulgence in alcohol.
47. To insist on prosecution of the two accused persons would be to subject the family to further trauma and strain family relations over what clearly appears to have been an accidental death.
48. The family has already lost a son and stares at the possibility of a very long term of imprisonment of the 1<sup>st</sup> accused which would mean double tragedy to the family. The family would be distressed to the fullest and would never recover and heal.
49. It is in recognition of that reality and considering the totality of the circumstances of this case, that this court is inclined to grant the request by the Director of Public Prosecutions to terminate the proceedings in the interests of justice.
50. The decision of the prosecutor meets the public interest consideration in deciding whether or not to prosecute. As a result, the nolle prosequi presented by the Director of Public Prosecution is hereby entered and the Criminal Case number E077 of 2024 against:-
  1. Simon Kimani Ng'unju
  2. Ian Njuguna Gikoni is hereby discontinued.
51. The two accused persons are hereby discharged and shall immediately be released from prison custody unless otherwise lawfully held.
52. The two accused person must thank the framers of our constitution for embedding reconciliation as a form of Alternative Dispute resolution in our constitution. The courts shall continue to breathe life into these constitutional provisions to make the realization of the dream of a new Kenya which cherishes the ideals of social justice a reality.
53. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30<sup>TH</sup> DAY OF JULY 2025.**

**A. M. MUTETI**

**JUDGE**

In the presence of:

Court Assistant: Kiptoo

Ms Dela for the state

Lwanga for the 1<sup>st</sup> Accused

Mogaka for the 2<sup>nd</sup> Accused

Accused : Present

