



Otieno & another v Director of Public Prosecution, Siaya & another (Constitutional Petition E003 of 2024) [2025] KEHC 11519 (KLR) (1 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11519 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CONSTITUTIONAL PETITION E003 OF 2024**

**DK KEMEL, J
AUGUST 1, 2025**

BETWEEN

PETER OTIENO 1ST PETITIONER

GEORGE OCHIENG 2ND PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION, SIAYA 1ST RESPONDENT

SENIOR PRINCIPAL MAGISTRATE COURT, SIAYA 2ND RESPONDENT

JUDGMENT

1. The Petitioners herein have filed a Petition dated 10/12/2024 pursuant to Articles 165(6)(7) of the Constitution, Article 258(2) (c) of the Constitution of Kenya, Rules 19, 23(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013.
2. The Petition seeks the following declaratory orders:
 - a. Declaration that the 1st Respondent’s decision made on the 4th April, 2023 in withdrawing the Siaya Criminal Case No. MCCR/161/2020: Republic Vs Caleb David Onyango and Alfred Omulo Onyuka and ratified by the 2nd Respondent was in violation of Articles 10, 25, 27, 47, 50, 157(11), 159 of the Constitution of Kenya 2010 and hence unconstitutional.
 - b. A declaratory order that the selective continued prosecution of Siaya Criminal Case No. MCCR/165/2020: Republic v. Peter Otieno and George Ochieng and the arbitral withdrawal of Siaya criminal case No. MCCR/161/2020: Republic v. Caleb David Onyango and Alfred Omulo Onyuka by the 1st Respondent amounts to abrogation of the Constitution of Kenya, and a violation of sections 4 and 14 of the Office of the Director of Public Prosecutions Act.



- c. A declaratory order that the manner in which the 1st Respondent withdrew Siaya criminal case No. MCCR/161/2020: Republic v. Caleb David Onyango and Alfred Omulo Onyuka violated the Petitioner's right to fair trial.
 - d. An order directing the 1st Respondent to cause the production of the police file in Siaya criminal case No. MCCR/161/2020: Republic v. Caleb David Onyango and Alfred Omulo Onyuka before the 2nd Respondent for reinstatement, hearing and determination on merit.
 - e. Costs of the Petition.
 - f. Any further relief or orders that this Honourable Court may deem just and fit to grant.
3. The Petitioners have brought this suit as a matter of public interest, to protect the application of the law and to protect and promote the principles and objects of the Constitution, fundamental rights and freedoms of the Petitioners and for those who may be affected now, plus future generations.
 4. The Petitioners' gravamen as can be gleaned from the petition is as follows:
 - i. That the Petitioners' claim is that their right to fair trial, the right to equal application and the benefit of the application of the law, non-discrimination, fair hearing and having their matter being MCCR/161/2020: Republic v Caleb David Onyango & Alfred Omulo Onyuka resolved by the application of the law and decided in a fair and just manner by an impartial body being the 1st Respondent has been curtailed by the 1st Respondent's action and omissions.
 - ii. That the 1st Respondent on the 4th day of April, 2023 had their criminal case MCCR/161/2020 Republic v Caleb Davie Onyango & Alfred Omulo Onyuka withdrawn on account that the police file was lacking yet key witnesses had testified in court and gave credible evidence.
 - iii. That MCCR/161/2020 Republic v Caleb Davie Onyango & Alfred Omulo Onyuka in which the Applicants are the Complainants is against the complainants in MCCR/165/2020; Republic v Peter Otieno & George Ochieng wherein the applicants are the accused person now ongoing.
 - iv. That in withdrawing the charges lodged by the Applicant/Complainants in in MCCR/161/2020; Republic v Caleb David Onyango & Alfred Omulo Onyuka against the complainants in MCCR/165/2020' Republic vs. peter Otieno & George Ochieng, the 1st Respondent claimed that the police file was lacking and that there was nothing he could do.
 - v. The 1st Respondent showed no interest in pursuing the matter whatsoever and upon inquiry as to why the police file was lacking, the Applicants were sent to Yala police station where they found the investigating officer who indicated that he had produced the police file in court and as such could not understand why the 1st Respondent claimed that the file was missing and further why he withdrew the case.
 - vi. That the Applicants have raised the issue with the 1st Respondent who has affirmed that there is nothing he can do having withdrawn the charges and further that the police file is still lacking.
 - vii. The Applicants have duly confirmed that preceding the withdrawal of their case by the 1st Respondent in MCCR/161/2020; Republic v Caleb David Onyango & Alfred Omulo Onyuka, the police file was in court on that material day and as such there was no basis why the matter was withdrawn.
 - viii. The matters MCCR/161/2020; Republic v Caleb David Onyango & Alfred Omulo Onyuka and MCCR165/2020: Republic vs. Peter Otieno & George Ochieng involve the same set of



persons in MCCR/161/2020 and that the complainants in MCCR/165/2020 are the accused persons in MCCR/161/2020 that has since been withdrawn.

- ix. The police officer who testified in MCCR/161/2020 is equally the police officer due to testify in MCCR/165/2020 who indicated that the police file in MCCR/161/2020 never went missing and as such he does not understand why the 1st Respondent withdrew the charge against the accused persons in MCCR/161/2020 and to the contrary has made a decision to prosecute actively the accused persons in MCCR/165/2020.
 - x. That from the proceedings, it is clear that the criminal case MCCR/161/2020 was the first one to be lodged by the Applicants herein as against the Complainants in MCCR/165/2020.
 - xi. The 1st Respondent's actions and omissions are in violation of Articles 10,20,22,23,25,27,28, 29,47,48,50 of the Constitution of Kenya, 2010 and Section 4, 14(a), (b), (c), (6) and 25(2) of the office of the Director of Public Prosecution Act.
 - xii. That the threat to maliciously and selectively prosecute the respective cases as stated is real and that that the Applicants will be highly prejudiced.
 - xiii. The Applicants claim against the 1st Respondent's action are unconstitutional, arbitrary, wrongful, null and void and therefore they should be stopped forthwith.
 - xiv. That it is indeed evidently clear that the 1st Respondent, one year down the line, has not done anything to ensure that the Applicants in MCCR/161/2020 have the equality and protection and the benefit of the law just like the complainants in MCCR/165/2020 are having their matter proceeding.
 - xv. That this petition seeks to protect and promote the principles and objects of the Constitution and fundamental rights and freedoms of the Applicants.
 - xvi. That this Petition seeks to secure and protect the rights to fair trial, equal protection and benefit from the application of the law, access to justice for all, freedom against discrimination and the right to fair hearing as the Applicants herein are likely to be adversely affected by the illegal and unlawful acts of the 1st Respondent.
5. The Petitioners aver that the Petition seeks to protect the right to fair hearing, fair trial, equality before the law, equal application, benefit and protection before the law, the rule of law, the right to fair administrative action, freedom from discrimination and to protect the overall rights of the Petitioners and all Kenyans who are likely to be adversely affected by the illegal and unlawful acts of the Respondents.
 6. The Petitioners claim therefore is against the 1st and 2nd Respondents actions that are unconstitutional, arbitrary, wrongful, null and void that ought to be stopped forthwith.
 7. Further, the Petitioners claim that the manner in which the 1st Respondent is conducting its affairs regarding the criminal cases being Siaya criminal case number MCCR/165/2020 and Siaya criminal case number MCCR/161/2020 is against the inalienable right to fair trial and that the Petitioners right to fair hearing has been threatened and likely to be further violated and as such the court ought to intervene before they are highly prejudiced.
 8. The Petitioners herein have anchored their petition and application on the following salient provisions of the law namely:
 - a. Article 2 of the Constitution provides that:



1. This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
 - (4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.
 - i. Article 3(1) of the *Constitution* provides that every person has an obligation to respect, uphold and defend this Constitution.
 - ii. Article 10. National values and principles of governance provides thus:
 - (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
 - (a) applies or interprets this Constitution;
 - (b) enacts, applies or interprets any law; or
 - (c) makes or implements public policy decisions.
 - (2) The national values and principles of governance include—
 - (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
 - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
 - (c) good governance, integrity, transparency and accountability; and
 - (d) sustainable development.
- c) Article 22(1) of the *Constitution* provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- d) Article 157(11) of the *Constitution* provides that:

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.’
- e) Article 165 (3)(a) and (b) provides that Subject to clause (5), the High Court shall have—
 - (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question of whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened
- f) Article 165(6)(7) of the *Constitution* provides:



- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
9. The facts of the matter are that the 1st Respondent on 4th April 2023 had their criminal case No. MCCR 161 of 2020 Republic versus Caleb David Onyango & Alfred Omulo Onyuka, withdrawn on account that the police file was missing yet key witnesses had already testified in court and given credible evidence.
 10. That criminal case No. MCCR 161 of 2020 Republic versus Caleb David Onyango & Alfred Omulo Onyuka in which the Petitioners are complainants is against the Complainants in MCCR/165/2020 Republic versus Peter Otieno & George Ochieng wherein the Petitioners are the accused persons now ongoing.
 11. That in withdrawing the charges in MCCR/161/2020 where the Petitioners are the complainants, the 1st Respondent claimed that the police file was missing and that there was nothing he could do.
 12. That the 1st Respondent showed no interest in pursuing the matter and upon inquiry on the police file, the petitioners were sent to Yala police station where they found the investigation officer who indicated that he had produced the file in court and did not understand why the Respondent claimed that the file was missing and had the matter withdrawn.
 13. That the two criminal cases MCCR/161/2020 and MCCR/165/2020 involve the same set of transaction in that the complainants in MCCR/161/2020 are the accused persons in MCCR/165/2020; while the complainants in MCCR/165/2020 are the accused persons in MCCR/161/2020 that has since been withdrawn.
 14. That the 1st Respondent has been actively pursuing criminal case number MCCR/165/2020 wherein the Petitioners are the accused persons.
 15. That from the proceedings, it is clear that criminal case MCCR/161/2020 was the first to be lodged by the Petitioners as against the complainants in MCCR/165/2020.
 16. That the 1st Respondent's actions and omissions are a violation of Articles 10, 20, 22, 23, 24, 25, 27, 28, 29, 47, 48, 50 of the Constitution of Kenya and sections 4 and 14(a), (b)(c)(6) and 25(2) of the Office of the Director of Public Prosecutions Act.
 17. That it is indeed evidently clear that the 1st Respondent, one year down the line, has not done anything to ensure that the applicants in MCCR/161/2020 have the equality and protection and the benefit of the law just like the complainants in MCCR/165/2020 whose matter is proceeding.
 18. That this petition seeks to secure and protect the rights to fair trial, equal protection and benefit from the application of the law, access to justice for all, freedom against discrimination and the right to fair hearing as the applicants herein are likely to be adversely affected by the illegal and unlawful acts of the 1st Respondent.
 19. The Petition was canvassed by way of written submissions. Both parties duly complied.
 20. The Petitioner's submissions are dated



21. The Petitioners' submissions are a reiteration of the averments in the Petition dated 10/12/2024
22. It was submitted that Section 87(a) of the *Criminal Procedure Code* permits the prosecutor to apply before the court seized of the case to withdraw the charge or charges facing an accused person at any time before final Judgement is deemed to be exercised in the interest of the administration of justice and to avoid abuse of the process in its proper application on merit which was not the case herein. It is the Petitioners view that there are exceptional circumstances on the 2nd respondent ability to regulate the 1st respondent's jurisdiction when it acts improperly, not for the interest of justice, acts beyond the powers vested by the *Constitution* of Kenya, 2010 or carrying out some arbitrary objective under the guise of discharging the functions of the office of prosecution as was the present case herein.
23. It was submitted that the fact that Article 157 empowers the 1st Respondent to prosecute all criminal cases, the 2nd Respondent on receiving the request under section 87(a) (b) herein, had the power to judiciously consider the elements of the provisions and proceed to give effect in the manner stated in the Code which in the view of the Petitioners it did not perform.
24. It was further submitted that section 4 of the *Office of the Director of Public Prosecutions Act* denotes that In fulfilling its mandate, the 1st Respondent shall be guided by the *Constitution* and the following fundamental principles— (a) the diversity of the people of Kenya; (b) impartiality and gender equity; (c) the rules of natural justice; (d) promotion of public confidence in the integrity of the Office; (e) the need to discharge the functions of the Office on behalf of the people of Kenya; (f) the need to serve the cause of justice, prevent abuse of the legal process and public interest; (g) protection of the sovereignty of the people; (h) secure the observance of democratic values and principles; and (i) promotion of constitutionalism.
25. It was also contended that sections 14 (5)(6) of the *Office of the Director of Public Prosecutions Act* demands that in the performance of a public prosecutor's duties under this Act, a prosecutor shall— (a) observe the guiding principles under section 4 of this Act; (b) carry out the prosecutor's functions impartially and avoid discrimination on any ground including race, gender, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth; (c) protect the public interest, act with objectivity, take account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect; (d) keep matters in the possession of the prosecutor confidential, unless the performance of a duty or the needs of justice require otherwise; and (e) consider the views and concerns of a victim where necessary. (6) A public prosecutor shall, in order to ensure the fairness and effectiveness of prosecution, cooperate with the National Police Service, the courts, the legal profession and other government agencies or institutions.
26. It was finally submitted that the Respondents are also in violation of Articles 10,25,27,47,50,157(11),159 of the *Constitution* of Kenya, 2010 and that the 1st Respondent is in violation of sections 4, 14 and 25 of the *Office of the Director of Public Prosecutions Act*.
27. The 1st Respondent's submissions are dated 1/7/2025 and wherein learned counsel raised two issues for determination firstly, whether the 1st Respondent violated the petitioners' rights and whether the court has jurisdiction in directing the 1st Respondent on what to do to a file once withdrawn.
28. The 1st Respondent submits that the ODPP acted in good faith and in compliance with the law. That upholding the rule of law and accountability includes ensuring that no prosecution proceeds without adequate evidence and therefore, the decision to withdraw the case temporarily cannot be construed as a violation of national values but rather, it reflects adherence to legal and professional standards of prosecutorial conduct.



29. As regards violation of Article 25 of the Constitution on the application of the Bill of Rights to all persons, it was submitted that the Petitioners must show how the 1st Respondent's action specifically limited or denied them the enjoyment of any right guaranteed under the Bill of Rights. No such proof has been adduced.
30. As regards violation of Article 27 of the Constitution on equality and freedom from discrimination, it was submitted that the Petitioners have not demonstrated any discriminatory action by the 1st Respondent. That the decision to withdraw the case was based on objective operational constraints and not on any discriminatory motive.
31. As regards the alleged violation of Article 47 on fair administrative action, it was submitted that the withdrawal of the case was neither arbitrary nor capricious. The ODPP communicated its reasons in open court, and the withdrawal was subject to judicial oversight and the Petitioner has not demonstrated how he was denied due process or the right to be heard. The remedy, if any, lies in the possible reinstatement of the charges, not in constitutional litigation.
32. It was submitted that Article 157(11) mandates that the 1st Respondent to exercise prosecutorial powers with regard to public interest, administration of justice, and prevention of abuse of legal process. That in the case in issue, proceeding without evidence would have constituted an abuse of legal process and thus the withdrawal was a lawful exercise of prosecutorial discretion under Article 157(6)(c) and the Criminal Procedure Code.
33. As regards the Petitioners claim that the trial court did not act independently, it was submitted that the court was not bypassed as the withdrawal was done under supervision of the trial magistrate and that there was no attempt to defeat justice or to undermine the authority of the court.
34. As regards the issue of whether the court has jurisdiction in directing the 1st respondent on what to do to a file once withdrawn, it was submitted that this court does not have the jurisdiction to order the 1st Respondent to reinstate a criminal case. Learned counsel cited the relevant provisions guiding the 1st Respondent in the performance of its duties as follows:

Section 87(a) of the Criminal Procedure Code

“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 Prosecution, at any time before judgment is pronounced, withdraw from the prosecution of any person...”

Article 157(6) & 157(11) of the Constitution

Article 157(6): Gives the Director of Public Prosecution exclusive authority to prosecute and discontinue criminal proceedings. Article 157(11): Requires the Director of Public Prosecution to act with regard to public interest, justice, and avoidance of abuse of legal process.

35. Learned counsel placed reliance in the case of Republic v Director of Public Prosecutions & 2 Others ex parte Chamanlal V Rajwani [2015] eKLR where it was held; “The court cannot direct the Director of Public Prosecution to prosecute or reinstate a case but may declare that a decision to withdraw was unlawful, thereby leaving it to the Director of Public Prosecution to reconsider.”

Further in Musyoka & Another v DPP & 2 Others [2020] eKLR it was held: “The court may not compel the Director of Public Prosecution to reinstate a charge, but may declare that the withdrawal was in violation of the Constitution or statute.” Top of Form Bottom of Form

36. It was submitted that the Petition as it is does not disclose any justifiable constitutional issue hence dissatisfaction with procedural decisions should not be elevated to constitutional litigation without



proof of actual rights violations. It was the 1st Respondent's contention that no violation of any of the cited constitutional provisions have been shown and that the withdrawal of the case was lawful and justified.

37. I have given due consideration to the Petition herein as well as the submissions filed. The issue for determination is whether the petition has merit.
38. The Petitioners' gravamen is that the Criminal Case No. MCCR 161 of 2020 Republic versus Caleb David Onyango and Alfred Omulo Onyuka was withdrawn under section 87A by the 1st Respondent on the grounds that the police file was missing. I have perused the proceedings of the said case No. MCCR/161/2020 and which indicates that prior to the said date of withdrawal on 3rd April 2023, a total of six (6) prosecution witnesses had testified. From the lower court record, the matter had been adjourned severally for various reasons. On 17/11/2022 there were no witnesses in court and that the matter was adjourned and summons issued to the investigating officer. On 28/11/2022, the matter was again adjourned on the grounds that the investigating officer was securing exams. On 17/1/2023, the police file was missing and that on 2/3/2023 they were expecting a witness but that he was not bonded and that the state was given a last adjournment. Finally, on 3/4/2023 the matter was withdrawn under section 87A of the [Criminal Procedure Code](#) for lack of the police file and to allow the prosecution to re-organize themselves.
39. From the chronology of the events in the case No. MCCR 161 of 2020, it is clear that the state was given a last adjournment by the 2nd Respondent and that when the matter came up and without the police file, the learned prosecutor sought to withdraw the matter under section 87(a) of the [Criminal Procedure Code](#) so as to enable the prosecution put its house in order. However, since then, it is almost one year but the 1st Respondent seems to have developed cold feet towards prosecuting the said matter. The Petitioners are indeed entitled to have their matter heard and concluded before a competent court of law in accordance with the principles under Article 10(2) of the [Constitution](#) which provides for the national values and principles of governance that include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized.
40. The Petitioners have claimed that they have been discriminated against by the 1st Respondent when it withdrew the case wherein they were complainants and in which about six witnesses had testified on grounds that the police file was missing yet that was not a serious factor for consideration as long as witnesses were available. The Petitioners also view the 1st Respondent's aggressive prosecution against them in a different file where they are accused persons betrays its independence in failing to consider the interests of the Petitioners as complainants in the case which they arbitrarily withdrew.
41. From the foregoing, it is clear that the Petitioners Constitutional rights to fair trial as envisaged under the supreme law of the land have been infringed. However, under article 157(6) of the [Constitution](#), the Director of Public Prosecution has power to discontinue any case before judgement as it has to have public interest, justice and the need to prevent abuse of due process. In the present circumstances, the 2nd Respondent being independent of the case allowed the prosecution's request to withdraw the case as it had indicated that it needed to organize their case. Indeed, under articles 157 (6), (7), (8), (10) and (11) of the [Constitution](#), the Director of Public Prosecution is vested with express powers to prosecute all criminal cases on behalf of the state, The Director of Public Prosecution can thus initiate, continue or choose to discontinue any criminal prosecution before a court of law. In the discharge of his functions, the DPP is also required to abide by the provisions of section 4 and 14(5)(6) of the [Office of the Director of Public Prosecutions Act](#). Section 4 thereof provides that the DPP shall be guided by the [Constitution](#) and fundamental principles inter alia; diversity of the people of Kenya; impartiality and gender equity; rules of natural justice; promotion of public confidence in the integrity of the



office; the need to discharge the functions of the office on behalf of the people of Kenya; the need to serve the cause of justice, prevent abuse of the legal process and public interest; protection of the sovereignty of the people; secure the observance of democratic values and principles and promotion of constitutionalism. Section 14(5) and (6) of the said Act provides that a prosecutor shall observe certain guiding principles inter alia; carry out duties impartially and avoid discrimination on any ground including race, gender, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth; protect the public interest, act with objectivity, take account of the position of the suspect and the victim and pay attention among others.

42. It is clear that the Petitioners' grouse is about the withdrawal of their case and the failure by the 1st Respondent to follow up quickly over the issue of the missing file and then proceed to reinstate the case for hearing and final determination. Indeed, under section 87(a) of the [Criminal Procedure Code](#), the Director of Public Prosecution can seek to withdraw a matter with the consent of the trial court at any time before judgement. In the present circumstances, it is noted that that the 1st Respondent had been granted a final adjournment by the trial court (2nd Respondent). As the trial court had given the final adjournment, the 1st Respondent had no option in the circumstances but to seek to tactically withdraw the matter so as to enable it to put its house in order. Up to that point, I do not see anything wrong on the part of the 1st Respondent as it was trying to salvage the situation. Had the 1st Respondent proceeded to close the case, then probably the trial court might have subsequently dismissed the charge to the detriment of the Petitioners who are the complainants. Further, the trial court had discretion to allow or disallow the withdrawal of the case depending on the prevailing circumstances. The Petitioners appear to have been compelled to resort to this mode in a bid to compel the 1st Respondent to act by seeking to reinstate the case is that the same could be concluded. The Petitioners have been irked by the conduct of the 1st Respondent in zealously prosecuting the pending case wherein they are the accused persons and failing to follow up on the case that they had withdrawn yet the circumstances giving rise to the two cases are one and the same. Under Article 157(11) of the [Constitution](#), the power of the 1st Respondent must be exercised appropriately 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 abuse of the legal process.
43. A perusal of the lower court file MCCCCR 161/2020 reveals that the case had proceeded substantially until the police file was reported to have gone missing and further the remaining witnesses were not called and that the trial court gave the prosecution a final adjournment. On the 3/4/2023, the prosecution did not have the police file or witnesses and since there was a final adjournment the prosecution sought for withdrawal under 87 (a) of the [Criminal Procedure Code](#) which request was granted by the trial court. As noted above, the prosecution resorted to withdrawing the matter so as to strategize on their case rather than allowing it to be dismissed by the trial court. Upto that point, the action of the prosecution was quite in order and beneficial to the Petitioners herein who were the complainants as they would still have another opportunity to come back and continue with their case once the same is reinstated. In that regard, the Petitioners' complaint against the 1st Respondent regarding the withdrawal must be rejected. It is instructive that the withdrawal was made before the trial court and under the supervision of the trial magistrate and that there was no hint of an attempt to defeat justice. It is obvious that the withdrawal of the case was based on the circumstances obtaining at the time namely that the prosecution had been granted a final adjournment and that the prosecution had been ordered to proceed with the matter and were thus compelled to withdraw their case and to strategize before coming back. The said withdrawal was subject to oversight by the trial court which allowed the request. The only grouse the Petitioners have is the fact that the 1st Respondent did not bother thereafter to seek to reinstatement of the matter for a long time yet the said 1st Respondent



has been zealously prosecuting a similar case (Siaya MC Cr 165/2020) wherein the Petitioners are the accused while their adversaries are complainant. The Petitioners feel that the 1st Respondent has thrown them under the bus yet they were the complainants in the case that was withdrawn. It seems the recalcitrance by the 1st Respondent to reinstate the case has compelled the Petitioners to file this constitutional matter. It is also not in dispute that the courts do not have jurisdiction to direct the Director of Public Prosecution whenever he is carrying his mandate under Article 157 of the Constitution. However, that notwithstanding, the Director of Public Prosecution is required under article 157(11) of the Constitution to act with regard to public interest, justice and avoid abuse of the legal process. In the case of *Musyoka & Another Vs DPP & 2 Others* [2020] eKLR it was held that a court may not compel the Director of Public Prosecution to reinstate a charge, but may declare that the withdrawal was in violation of the Constitution or statute and thereby leave it to the DPP to reconsider. It is noted that it has taken about one year since the withdrawal of the case yet the 1st Respondent has not taken any proactive steps towards reinstatement despite evidence showing that the 1st Respondent is currently busy prosecuting Siaya CM Cr 165/2020 which arose out of the same circumstances as in Siaya CM Cr 161/2020 and in which the parties litigating are the same.

44. Going by the conduct of the 1st Respondent in failing to seek to reinstate the case that they had withdrawn and then going ahead to prosecute Siaya CM Cr 165/2020 with zeal, it has become quite clear that the 1st Respondent has not acted in good faith towards the Petitioners and that it has gone against the clear provisions of Section 4 and 14 (5) (6) of the Office of the Director of Public Prosecutions Act. Due to this betrayal on the part of the 1st Respondent, the Petitioners rights to fair hearing have been severely abrogated. It is instructive that the Petitioners are unable to pursue their complaint since the 1st Respondent has withdrawn their case and has abandoned them. It is curious that the 1st Respondent is currently prosecuting Siaya CM Cr. 165/2020 wherein the Petitioners are the accused persons and in which the police file is readily available while the Petitioners case Siaya CM CR. 161/2020 remains withdrawn on the basis of lack of police file yet the incidences in both cases are similar. It does not take rocket science for one to notice that the 1st Respondent's conduct is discriminatory against the Petitioners. The Petitioners upon pursuing the 1st Respondent for a period of one year to reinstate the case that they withdraw, have been compelled to approach this court for redress over the said violation of their constitutional rights. It is evident therefore that the 1st Respondent in seeking to withdraw criminal case No. 161/2020 was to ensure that the Petitioners case did not sail through as can be seen from the fact that the 1st Respondent did not bother at all to look for the police file or even seek to reinstate the case. The 1st Respondent upon withdrawal, proceeded to prosecute Cr Case No. 165 of 2020 where in the Petitioners are the accused persons. It is noted that the Petitioners have urged this court to direct the 1st Respondent to cause the production of the police file in Siaya CM Cr 161/2020 as well as reinstatement of the case to be heard by the 2nd Respondent on merit. However, the Constitution has given the 1st Respondent the role of independently prosecuting all criminal cases and as such the courts cannot direct the 1st Respondent to prosecute or reinstate cases. The only thing that the court can do is to declare that the decision to withdraw the case was unlawful and that it is up to the 1st Respondent to reconsider its actions as guided by the provisions of Article 157 (11) of the Constitution as well as Section 4 and 14 (5 and 6) of the Office of the Director Public Prosecution Act. Hence, this court is unable to grant the order compelling the 1st Respondent to pursue the police file or reinstatement of Criminal Case No. 161 of 2020. To that extent, this court will proceed to grant the Declaratory Orders sought in the petition excluding the order directing the 1st Respondent to perform its duties.
45. In view of the foregoing observations, it is my finding that the Petitioners' Petition dated 10/12/2024 has merit. The same is allowed in the following terms: the Petitioners shall have costs of the Petition.



- a. Declaration that the 1st Respondent's decision made on the 4th April, 2023 in withdrawing the Siaya Criminal Case No. MCCR/161/2020: Republic Vs Caleb David Onyango and Alfred Omulo Onyuka and ratified by the 2nd Respondent was in violation of Articles 10, 25, 27, 47, 50, 157(11), 159 of the Constitution of Kenya 2010 and hence unconstitutional.
- b. A declaratory order that the selective continued prosecution of Siaya Criminal Case No. MCCR/165/2020: Republic v. Peter Otieno and George Ochieng and the arbitral withdrawal of Siaya criminal case No. MCCR/161/2020: Republic v. Caleb David Onyango and Alfred Omulo Onyuka by the 1st Respondent amounts to abrogation of the Constitution of Kenya, and a violation of sections 4 and 14 of the Office of the Director of Public Prosecutions Act.
- c. A declaratory order that the manner in which the 1st Respondent withdrew Siaya criminal case No. MCCR/161/2020: Republic v. Caleb David Onyango and Alfred Omulo Onyuka violated the Petitioner's right to fair trial.
- d. Each party to bear their own costs.

Orders accordingly.

DATED AND DELIVERED AT SIAYA 1ST DAY OF AUGUST, 2025.

D. KEMEI

JUDGE

In the presence of:

Oduol.....for Petitioners

M/s Kerubo.....for 1st and 2nd Respondent

Kimaiyo.....Court Assistant

