



**Abdi v Republic (Criminal Appeal E010 of 2023)
[2024] KEHC 6570 (KLR) (31 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6570 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E010 OF 2023**

MW MUIGAI, J

MAY 31, 2024

**IN THE MATTER OF: AN APPLICATION FOR REVISION UNDER SECTION 362
AND 364 OF THE CRIMINAL PROCEDURE CODE CHAPTER 75 LAWS OF KENYA
AND SECTION 9 (2) AND (3) OF THE VICTIM PROTECTION ACT, NUMBER 17
OF 2014, ARTICLES 157 (II) , 165 (6) AND (7) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE CHIEF MAGISTRATE’S COURT AT MAVOKO
MCCR E1197 OF 2022 : REPUBLIC VS ABDIRAHMAN MAALIM MUHUMED
AKA FARAH & MOHAMED AHMED ABDULAHI AKA ZAKARIA**

BETWEEN

DAARA ABDI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Notice Of Motion

1. Vide a Notice of Motion Application dated 24.07.2023, the Complainants/Victims seek the following orders from the court;
 - a. Spent
 - b. Spent
 - c. The court in exercising its revisionary powers under sections 362 and 364 of the Criminal Procedure Code to call for and examine the record in Chief Magistrates Court at Mavoko in Criminal Case Number E1197 of 2022; Republic v Abdirahman Maalim Muhumed AKA Farah & Mohamed Ahmed



Abdulahi AKA Zakaria for purposes of satisfying and pronouncing itself as to correctness, legality and propriety of the proceedings and the orders issued on 6th July 2023

- d. The court be pleased to revise, vary and/or set aside the orders issued on July 6, 2023 by Hon R. Gitau (R.M) in Mavoko Criminal Case Number E 1197 of 2022 Republic v Abdirahman Maalim Muhumed AKA Farah & Mohamed Ahmed Abdulahi AKA Zakaria and order that the trial proceed to its logical conclusion before any other court of competent jurisdiction with the exclusion of the prosecutors involved in the said withdrawal namely ; Jackson Motende, Susan Kuruga and Mueni Mutua
 - e. Any other orders the court deems just and fit to grant in the interest of justice
 - f. Costs of this application be in the cause.
2. The Application is supported by an affidavit sworn by Daara Abdi, the Complainant/victim on 24.07.2023 in which he deposed that the accused persons were charged with four counts on December 13, 2022 being;
- a. Robbery with Violence contrary to section 296(2) of the [Penal Code](#)
 - b. Malicious damage to property contrary to section 339 (1) of the [Penal Code](#)
 - c. Stealing contrary to section 268 (1) as read with section 275 of the [Penal Code](#)
 - d. Assault causing actual bodily harm contrary to section 250 as read with section 251 of the [Penal Code](#)
3. The accused persons did not take plea since their advocate on record, Danstan Omari advocate raised a preliminary objection that the charge of robbery with violence under section 296(2) of the [Penal Code](#) did not disclose and offence known in law. The preliminary objection was dismissed vide a ruling delivered in March 3, 2023 but the accused did not take plea thereafter as the prosecution informed the court that the file had been forwarded to Office of the Director of Public Prosecutions (hereinafter referred to as “ODPP”), Machakos on instructions of Susan Karuga, the In-charge Mavoko ODPP and as such she did not have the file.
4. The Applicant contends that the prosecution may be compromised on the following grounds;
- a. On May 3, 2023 the court was misled to believe that the accused persons had formally sought review of the charges whereas they had not
 - b. The accused persons through their advocates only sought to review of the charge vide the letter dated May 8, 2023 which was 4 days after misleading the court that this action was done and the file had been forwarded to ODPP Machakos office.
 - c. They thus obtained adjournment at the expense of the court and the complainants
 - d. No timelines were given or set by the prosecution within which the report/ findings ought to be filed in court.
 - e. The letter dated May 29, 2023 from the ODPP confirms that the they received a letter dated 8.5.2023 from the accused persons’ advocates office
 - f. The letter dated May 6, 2023 from the 2nd Accused was received and stamped on the same day and not May 3, 2023 as alleged by the prosecution.



- g. The delay tactics of the accused counsels was embraced by the prosecution in entirety
5. It was contended that on July 6, 2023 the prosecution made an application for withdrawal of count 1, 3 and 4 against the 1st accused and count 1, 2, 3, and 4 against the 2nd accused person under section 87(a) of the Criminal Procedure Code on account of hearsay and unsubstantiated allegations of hearsay and unsubstantiated allegations of collusions as against the police/ investigating officer.
6. It was further contended that count 1 against all the accused person was robbery with violence, a capital offence. He deposed that the charges and/or counts were withdrawn and this prejudiced the complainants who live in apprehension and fear having lost faith in the criminal justice system.
7. It was averred that the court ought to have taken certain considerations before granting the withdrawal, these were;
- a. The serious nature of the offence of robbery with violence using crude weapons, which is prevalent in the area where it occurred hence requires a full trial with conviction, if there is evidence to substantiate the charge and appropriate punishment for deterrence.
- b. The circumstances surrounding the approval of the DPP who has constitutional mandate and duty to consider under Article 157 (2) the public interest and the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.
- c. It is in the interest of justice that offenders in serious crimes should be suitably prosecuted and punished if found guilty.
- d. Improper termination of serious criminal charges will demoralize police and prosecutorial agencies to the detriment of the country's ability to combat and deter such crimes.

Grounds Of Opposition

8. The Respondent opposed the application on the following grounds;
- a. The application is misconceived, incompetent and amounts to abuse of the court process and should be dismissed
- b. The applicant is trying to usurp the constitutional powers under Article 157 (6) (c) of the Constitution, Section 25 (1) of the ODPP Act No 2 of 2013 and section 87 A of the Criminal Procedure Code vested in the ODPP
- c. The Respondent has the right to review cases continuously, before a determination is made by the Court.
- d. The Director of Public Prosecutions does not require the consent of any person or authority for the commencement and discontinuation of criminal proceedings and in exercise of his powers or functions shall not be under the direct control of any person or authority .
- e. The application is frivolous and vexatious.

Replying Affidavit

9. Martin Mwongera, prosecution counsel in the ODPP deposed on August 31, 2023 that the ODPP at Mavoko sub county reviewed the police file in criminal case no E1197 of 2022 R v Abdirahman Maalim Muhumed & Mohamed Ahmed Abdulahi and made recommendations He contended that the applicant lacks *locus standi* as she is not the complainant in count 1, 3 and 4. Furthermore, she alleges authority of other complainants but no evidence has been adduced on the same.



10. That the Counsel watching brief and the Applicant were in court during the withdrawal and did not raise any objections therefore this application is an afterthought. It was Counsel's position that Counsel watching brief cannot usurp the constitutional powers vested in the ODPP. It was further contended that the ODPP functions in due regard to public interest, the interest of the administration of justice and the need to void abuse of the legal process.

Further Affidavit

11. The Applicant deposed on September 13, 2023 that the Counsel who swore the Replying affidavit did not participate in the Trial Court proceeding thus cannot attest to the subjective review of charges. It was contended that the review was done by the ODPP, head office Machakos and not at Mavoko Sub county. In addition, the applicant by virtue of Article 48 and 50 (1) of *the Constitution* and section 9(2) and (3) of the *Victim Protection Act* has a right to seek revision of withdrawal of charges done contrary to the law and against the public interest as envisaged under Article 157 (2) of *the Constitution*.
12. The applicant contends that whether or not she is a complainant in the counts withdrawn, that does not justify the illogical withdrawal of the same. Further that this is not a representative suit but an application for revision. That whether or not the counsel watching brief raised an objection on the date of withdrawal cannot curtail their right to seek revision and the application is not an afterthought as it is provided for under the law.
13. The Applicant deposed that the counsel watching brief Counsel was not aware that the matter was coming up for withdrawal on July 6, 2023 as it was done in his absence and he was placed on record after the withdrawal was done.
14. Relying on the *Victim Protection Act*, it was the Applicant's position that the purpose of watching brief is to help protect the rights and interests of victims of crime towards ensuring the criminal process is conducted well to bring about just outcomes and the victim has a right to be heard and respond to criminal proceedings before any decision that affects the victim is taken.
15. Lastly, the Applicant stated that when the matter came up on August 17, 2023 before the Trial Court, the Court directed that the file be placed before Court 1 for reallocation and it was re allocated to court 2. According to the Applicant, this goes to show that the withdrawal of charges was marred with controversy and was done contrary to the law and if the court was sure of the charges, it would have waited for the outcome of the High Court.
16. Further, that the Respondent ought not to have preferred the charges in the first place if there was no sufficient evidence and where there were loopholes, it was their mandate to advise the Investigating Officer but not abdicate their duty and blame the victims.
17. The applicant also filed another affidavit dated December 13, 2023 in which it was further stated that the grounds of opposition address issues of fact and are general averments as they do not disclose any point of law or otherwise challenge the application and the same should be dismissed.
18. The Application was canvassed by way of written submissions.

Applicant's Submissions dated 24.11.2023

19. The Applicant in addition to the content in the affidavits it was further submitted that the issue of falsehoods and lies told by the prosecution which are supported by the court proceedings has not been challenged or denied by the prosecution. It was the Applicants contention that the letter for review dated May 8, 2023 could not have been received on May 3, 2023 before it was written. That the



considerations that the court ought to take before granting an application for withdrawal were not considered by the Trial court.

20. The Applicant submitted that the ingredients for robbery with violence that the offender was armed with crude weapons and was in the company of more than one person were met and evidence was presented to the prosecution including witness statements.
21. It was contended that the withdrawal of the charges against the accused persons was pre-meditated, based in lies and falsehoods and thus cannot stand. It was commenced illegally thus null and void *ab initio*. The Applicant questioned why the prosecution stated that the matter related to a land dispute as the reason for withdrawal of the charges and still preferred charges against the accused persons.
22. The Applicant submitted that the Honorable court confirmed the charges being withdrawn and never sought the reasons thereto and the victims' counsel was informed when he arrived at the tail end after allowing the prosecution's application that "my hands are tied and it is the court's duty to hear cases and not to charge." Additionally, it was contended that the victims were surprised that despite being done for more than for a month, they only became aware of the conclusion of the review on July 6, 2023 yet it is paramount that the counsel watching brief be supplied with a copy to advise his clients accordingly. Reliance was placed on the cases of *Ann Wanja v Republic* [2022] e KLR, [*Republic v Peter Kibe & 7 Others*](#) [2021] e KLR and [*Richard Lelu Matheka and 2 Others v R, Makuani Cr Revision no 168 of 2020*](#)

Respondent's Submissions dated 17.01.2024

23. The Respondent relied on Article 157 of [*the Constitution*](#) and Section 4 of the [*ODPP Act*](#) and submitted that the prosecutors in Mavoko under Machakos County acted in good faith to review the evidence of this matter. Due process was followed appropriately, since the Machakos County Director also scrutinized the police file and concurred with recommendations.
24. Further that the decision whether to charge or not to charge is the hallmark of the institution of criminal proceedings and the heart of the state criminal justice thus behooves the prosecutor to act with independence, integrity, impartiality and professionally in the administration of justice. Reliance was placed on the case of [*Diamond Hasham Lalji & another v Attorney General & 4others*](#) [2018] E KLR, [*Musyoki Kimanthi v Inspector General of Police & 2 others*](#) [2014] e KLR, [*Peter Ngunjiri Maina v Director of Public Prosecutions*](#) [2017] e KLR and [*Public Prosecutor v Muhari bin Mohd Jani and another*](#) p1996] 4 LRC at 734,735

Analysis & Determination

25. I have considered the Application, the affidavits on record, the submissions of the parties and the Trial Court record E 1197 of 2022 Mavoko Law Courts and find the issue for determination is;
 - a. Whether the orders issued on 6th July 2023 by Hon R. Gitau (R.M) in Mavoko Criminal Case Number E 1197 of 2022 Republic v Abdirahman Maalim Muhumed AKA Farah & Mohamed Ahmed Abdullahi AKA Zakaria should be set aside, revised or varied.
26. This Court is called upon to exercise its revisionary powers under Section 362 and 364 of the Criminal Procedure Code. Section 362 provides as follows;

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or



propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

27. Section 364 of the Act provides for powers of the High Court on revision that;

- (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—
 - (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
 - (b) in the case of any other order other than an order of acquittal, alter or reverse the order
 - (c) in proceedings under section 203 or 296(2) of the Penal Code, the *Prevention of Terrorism Act*, the *Narcotic Drugs and Psychotropic Substances (Control) Act*, the *Prevention of Organized Crimes Act*, the *Proceeds of Crime and Anti-Money Laundering Act*, the *Sexual Offences Act* and the *Counter-Trafficking in Persons Act*, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.
- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:
Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
- (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
- (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

28. From the record, the Applicant takes issue with the proceedings from 3/5/2023 to when certain counts were withdrawn by the Respondent under section 87(a) of the *Criminal Procedure Code*. The Trial Court granted the Prosecution/ODPP’s application for withdrawal of charges as follows;

Count 1 3 & 4 are to be withdrawn against 1st Accused person under Section 87 (a) *CPC*



Count 2 to remain against the 1st Accused person to continue to its logical conclusion.

Count 1 2 3 & 4 to be withdrawn against the 2nd Accused person under Section 87 (a) CPC.

The Trial Court granted the application for withdrawal as

prayed and gave Pre-Trial date for the 1st accused person's plea-taking hearing on Count 2.

29. The said section provides that;

In a trial before a subordinate court a public prosecutor may with the consent of the court or on the instruction or the Attorney General at any time before the judgment is pronounced withdrawn from the prosecution of any person and upon withdrawal:-

- (a) if is made before the accused person is called upon to make his defence, he shall be discharged but the discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.

Article 157 of the Constitution is a proviso that established the office of the director of public prosecutions, 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.

Section 5 (4e) of the [ODPP Act](#) provides that the ODPP shall;

review a decision to prosecute, or not to prosecute, any criminal offence;

Section 87 of the [Criminal Procedure Code](#) was discussed in in the case of [Republic v Leonard Date Sekento](#) [2019] eKLR where the court stated as follows;

“In this context section 87(a) of the [Criminal Procedure Code](#) which is relevant to this application 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. This power is deemed to be exercised in the interest of the administration of justice and to avoid abuse of the process.

According to section 87(a) of our code the public prosecutor may with the consent of the court at any time before judgment withdraw from the prosecution of any person and upon withdrawal:

- (a) If it's made before the accused person is called upon to make his defence, he shall be discharged, but the discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.
- (b) If is made after the accused person is called upon to make his defence he shall be acquitted the exercise of judicial discretion in determining between the two parameters is to ascertain that the derived power on both ways is reasonable and rationale to the objective sought to be achieved.

A central principle to be borne by the trial court is whether the threshold has been met before either of the decision in (a) or (b) is reached to discharge or acquit the accused person.

In my view a trial court exercising discretion under section 87(a) or (b) of the [criminal code](#) whether in the trial construing of the provisions the prosecutor has acted beyond his constitutional powers. If the application passes the test set by the legislature, then it would not be of the business of the court to control the prosecutor acting in accordance with his constitutional role and enabling provisions of the code.

The essential character of the office of the Director of Public Prosecution under Article 157 of [the constitution](#) is that in exercise of its power the principle of independence is guaranteed and availed to the office. In fact, the Article reads that in exercise of his powers or functions the Director of Public Prosecution is not under the direction or control of any person or authority. So in deciding the operation of section 87(a) (b) of the [Criminal Procedure Code](#) and its propriety in a particular case one has had to be concerned whether the reasons selected is in conflict with [the constitution](#).

However, there are exceptional circumstances on the courts ability to regulate the Director of Public Prosecution jurisdiction. In other words, when he acts improperly, not for the interest of justice, acts beyond the powers vested by [the constitution](#) or carrying out some arbitrary objective under the guise of discharging the functions of the office of prosecution. (Emphasis added)

.....



That the spirit and tenor of judicial discretion is to advance the objects and principles of a right to a fair trial under Article 50 of *the constitution*. The fact that Article 157 empowers the Director of Public Prosecution to prosecute all criminal cases, the trial court on receiving the request under section 87(a) (b) has the power to judiciously consider the elements of the provisions and proceed to give effect in the manner stated in the code.”

30. This court has supervisory duties accorded to it by *the Constitution* under Article 165 and section 362 of the *Penal code*, the duty includes satisfying itself that the record is correct, legal, there is propriety of any findings, sentence or order recorded or passed.

31. According to the Applicant, the decision to withdraw certain charges against the accused persons was not done in good faith or in the interest of the public. Further, that the order was irregular, unjust and unfair.

32. The court record indicates as follows;

a. There is a Mr. Gedi, Advocate who has been on record from December 30, 2022 for the victims. On that date, there was a Mr. Otieno, Advocate holding brief for Mr. Gedi.

b. There was an issue of representation of the accused persons that arose on February 9, 2023 and it was resolved that Mr. Omari, Advocate will represent the accused persons.

33. On 3/5/2023 the record indicates as follows;

Before Hon R. Gitau SRM

Prosecutor – Mutua

Court Assistant – Achieng

Accused present

Prosecutor : We are in receipt of a letter from MAC Advocates

Mr. Muchiri holding brief for Mr. Dunstan Omari for the Accused: I pray for the file to be placed aside to address the issue of representation

Court: file placed aside

.....

Mr. Muchiri : I pray that plea can be deferred until next week when Mr. Omari will be present

Mr Otieno Watching Brief: I oppose the application as plea has been deferred for long. There are not genuine reasons why they cannot take plea. They have an able counsel. They are entitled to bail and bond. It is paramount that plea be taken today.

Prosecutor: I am requesting for a mention next week. I have instructions from my incharge that she has received a letter from our in charge for her to forward the file for revised based on the 1st count. I have not been furnished with the letter.

Mr. Muchiri: My request for next week is because the accused were represented by Mr. Omari. If counsel for the victim is apprehensive he can approach the court for the appropriate orders. I also pray for a copy of the ruling.

Court: mention on 11/5/23 for plea taking. The defence to be furnished with a copy of the ruling.

34. On May 11, 2023 the prosecutor told the court that they had received a letter from Mogaka Musyoki Advocate requesting for review of the charges which were preferred. The prosecutor told the court



that Ms. Kuruga S.C and Sgt. Mate I.O and had instructions to forward the file to Machakos and do a brief on it and requested for more time to decide on how to proceed.

35. On the same day, the counsel watching brief expressed concerns about the delay in taking plea and stated that his clients felt that there was mischief. That the ODPP had earlier indicated the letter had been forwarded to machakos but the letter came later. The court directed that plea be taken and told the parties that nothing stopped them from reviewing the orders
36. On July 3, 2023, Counsel watching brief indicated to the court that review had been done. It is not clear what exactly was being reviewed from the record.
37. On July 6, 2023, the Prosecutor, Counsel watching brief and Mr. Mabeya for the accused person were in court. On this day indeed, all charges were withdrawn against the 2nd accused person and count I,III and IV against the 2nd accused person were withdrawn under section 87 (a) of the [Criminal procedure Code](#).
38. The Applicant has attached a letter form Musoyi Mogaka & Co advocates dated May 8, 2023 and was received on May 6, 2023 whose subject is to request for review of charges against the two accused persons in MCCR E1197 R v Abdi Rahman Maalim of 2022 Muhumed & Another.
39. In the case of [Anne Wanja v Republic](#) [2022] eKLR the court whilst dealing with a similar predicament found as follows;

“The record shows that the prosecution’s case had commenced. In my view, the Applicant, who was the complainant should have been given reasons when the case was terminated since the criminal charges that were before the learned trial Magistrate, involved both the accused persons and the Applicant who was the victim. Therefore, I agree with Mr. Oloo’s submissions that the learned Magistrate ought to have sought reasons from the prosecutor as to why they were seeking to withdraw the case instead of rubber stamping the request to terminate the proceedings.”

40. The role of victims in criminal proceedings in Section 9 of the [Victim Protection Act](#), 2014 provides for the rights of a victim during the trial process as;

(1)A victim has a right to —

- (a)be present at their trial either in person or through a representative of their choice;
- (b)have the trial begin and conclude without unreasonable delay;
- (c)give their views in any plea bargaining;
- (d)have any dispute that can be resolved by the application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal or body established by law;
- (e)be informed in advance of the evidence the prosecution and defence intend to rely on, and to have reasonable access to that evidence;
- (f)have the assistance of an interpreter provided by the State where the victim cannot understand the language used at the trial; and
- (g)be informed of the charge which the offender is facing in sufficient details.



(2) Where the personal interests of a victim have been affected, the Court shall—

(a) permit the victim's views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court; and

(b) ensure that the victim's views and concerns are presented in a manner which is not—

(i) prejudicial to the rights of the accused; or

(ii) inconsistent with a fair and impartial trial.

(3) The victim's views and concerns referred to in subsection (2) may be presented by the legal representative acting on their behalf.

41. A victim is defined in Section 2 of the *Victims Protection Act, 2014* as any natural person who suffers injury, loss or damage as a consequence of an offence;

Still on victims, Section 4(2)(b) of the *Witness protection Act* provides that;-

“Every victim is as far as possible given an opportunity to be heard and to respond before any decisions affecting him or her is taken.” [Emphasis mine]

42. Having considered the whole Trial court record, I note that the victim or complainant was not involved in the process of withdrawal of the charges, they allege that they were not consulted and this has not been denied by the Respondent. Criminal litigation is a tripartite relationship in this day and age with the enactment of the *victim protection Act*, the victim plays a vital role in these proceedings. The victim was not copied in the letters. The issue of *locus standi* cannot arise because she is a witness from a cursory perusal of the charge sheet.

43. This Court citing Supreme Court's decision *Republic v. Joseph Lentrrix Waswa* [2016] eKLR dealt with the question of the role/place of Watching brief Counsel/Victim lawyer rendered itself on this matter in the case of *Republic v Sammy (Criminal Case 36 of 2019)* [2022] KEHC 195 (KLR) and found as follows;

“This Court finds from the case law unpacked to aid interpretation and application of Section 9 & 13 of *VPA* a number of concerns arise;

(a) The victim is now part and parcel of Court proceedings.

(b) The victim's counsel present raises concerns and views of victim.

(c) The application by victim's counsel may be made at any stage of the proceedings.

(d) The victim representation is not restricted to any process as victims counsel is entitled to cross-examine or present evidence or file submissions or reply to application.

23. So long as;

(a) The role of DPP/Prosecution is not vitiated interfered with and/or;

(b) That the tenets of fair trial are not compromised or prejudicial to the accused person.

44. From the Trial Court record, the Trial Court was presented with a letter presumably the detailed evaluation of evidence from the ODPP Machakos to OC DCI Mlolongo dated 23/5/2023 where a number of anomalies were noted and recommendations to aid further investigations and where evidence was not available proposal to withdraw charges was preferred.



45. Unfortunately, it is not clear from the record that the Complainant /victim Watching brief Counsel/ was contacted, served with the said Report and/or present during the proceedings to address the Court on any concerns before the Trial Court made its decision/order.
46. This was contrary to the laid down position in Waswa case supra, a victim /complainant is part of the proceedings and views and /or concerns may be raised by Counsel.
47. Secondly, the reasons for withdrawal ought to have been ventilated either by the ODPP/Prosecution at least even in summary of the detailed report and response from Defense Counsel and Watch brief / Victim Counsel and then the Court to grant /deny orders and confirm reasons for the orders.
48. I have perused the record, the Trial Court ably dealt with suspension of plea-taking of the 1st Count of robbery with violence on account of being declared unconstitutional for ambiguity and degrees of aggravation in High Court Petition 618 of 2010 Joseph Kaberia Kahinga & 11 others v AG but as was considered in the Trial Court's Ruling of 3/5/2023 the Trial Court which also considered Eric Omondi Okello v Republic thro DPP [2018] Paul Gatana Njuguna v Republic 2016 eKLR & Jeseph Onyango Owuor & Anor v Republic [2008] and concluded the issue of robbery with violence offence being un- constitutional or not is not settled. Hence the suspects were to take plea. It is thereafter, that the charges were dropped and only the Count 2 of malicious damage to property was preferred only against 1st Accused.
48. The affidavit filed in Court by MOHAMED AHMED ABDULAHI detailed his back ground a student from University of Nairobi and attached copy of his admission card and had visited his Uncle on the fateful day when they were both arrested.
49. The evaluation of evidence report by ODPP, noted that none of the witnesses knew identified 2nd Accused at the scene no identification parade was conducted and no evidence was recorded by the Scene visiting Officers where offence took place nor Arresting Officer explained his connection to the events that led to the charge.
50. In conclusion, I find that the order of withdrawal in Mavoko Criminal Case Number E1197 of 2022; Republic v Abdirahman Maalim Muhumed AKA Farah & Mohamed Ahmed Abdulahi AKA Zakaria on 6th July, 2023 was not within the provisions of Article 157(11) of *the Constitution* and within the other broader principles and values in the administration of justice where justice is open, transparent, responsive and accountable under Article 159 of *the Constitution*. Hence in exercise of powers donated to this court under Section 362 of the Criminal Procedure Code, I find the order to withdraw charges without victim/Complainant knowledge or Victim's lawyer present informed or served with the ODPP report irregular and lacking in propriety and set the same aside.

Disposition

51. Accordingly, I direct the matter to be mentioned before the Chief Magistrate Mavoko for directions to conduct withdrawal proceedings in line with Article 50 of *the Constitution* ensuring a fair hearing with input of Victim/Complainant and/or lawyer's input.

It is so ordered.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT ON 31/5/2024 IN MACHAKOS HIGH COURT VIRTUALLY/PHYSICALLY

M.W. MUIGAI

JUDGE

