



Case Number:	Petition 285 of 2016
Date Delivered:	17 Nov 2016
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Edward Muthoga Muriithi
Citation:	Mary Kinya Rukwaru v Office of the Director of Public Prosecutions & another [2016] eKLR
Advocates:	M/S MUIGAI KEMEI & Associates, Advocates for the Petitioner. Mr. Mutuku & Mr. Okello for the Respondent. M/S Kaplan & Stratton, Advocates for the Interested Party.
Case Summary:	-
Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition declined with costs to the Respondent.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI LAW COURTS  
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION  
PETITION NO 285 OF 2016

MARY KINYA RUKWARU.....PETITIONER

VERSUS

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS .....RESPONDENT

AND

RAGHUNATHAN SANTHOSH .....INTERESTED PARTY

**JUDGMENT**

**THE INTRODUCTION**

1. The Petitioner's husband and two children were killed in a road accident, which is the subject of traffic offence charge of causing death by dangerous driving contrary to section 46 of the Traffic Act, cap. 403, in Traffic Case No. 13686 of 2014 against the Interested Party. Following negotiations between her and the accused, she proposed to have the matter settled by way of reconciliation and payment of compensation and a plea bargain for the withdrawal of the Traffic offence charges against the Interested Party.

2. The Interested Party maintains his plea of not guilty to the charge but has agreed to compensate the petitioner on a without prejudice basis on condition that the charges are withdrawn in terms of section 137A (1) (b) of the Criminal Procedure Code.

3. The Director of Public Prosecution has refused to grant his consent to the settlement and, consequently, the Petitioner has sued the DPP by a Petition dated 5<sup>th</sup> July 2016, which is supported by the Interested Party, seeking orders as follows:

***A. This Honourable Court be pleased to declare that the process of reconciliation between the petitioner and the Interested Party has been done in accordance with Article 159 of the Constitution. Section 137A (1), (b) & (2) of the Criminal Procedure Code Cap 75 Laws of Kenya and section 15(1), (2) & (3) of the Victim Protection Act and is therefore proper and duly enforceable Court.***

***B. This Honourable Court be pleased to declare that refusal by the Office of the Director of Public Prosecutions to ratify the agreement between the parties is in clear contravention of Article 157 (11) of the Constitution which provides that in performing his duties, 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.***

**C. This Honourable Court be pleased to order that the complaint brought against the Accused person, Mr Rangunathan Santhosh, be withdrawn and no further criminal proceedings be instituted on the basis of the same complaint.**

**D. Such other orders as this Honourable Court shall deem just.**

**E. Courts of this petition.”**

## **THE RESPONSES**

4. The Respondent filed a replying Affidavit sworn by Deputy Director of Public Prosecutions, Mr. Nicholas Mutuku, on 24<sup>th</sup> August 2016 in which its case was set out in paragraphs 3 – 11 as follows:

### **“Respondent’s replying affidavit of Nicholas Mutuku dated 24<sup>th</sup> August 2016**

3. *That am fully aware of the reconciliatory and restorative measures proposed by the petitioner and the interested party, and the same is confirmed by the exchange of correspondent between all the parties as exhibited in the affidavit of Senior Counsel Fred N’cuba Ojiambo dated 14<sup>th</sup> July 2016.*

4. *That it is not true that the officer of the DPP is opposed to the reconciliatory and/ or restorative justice being pursued by the parties and this can be confirmed by the DPP’s letter of 11<sup>th</sup> February 2016 addressed to Fred N Ojiambo, SC, and Mary Muigai of Muigai, Kemei and Associates. A copy of the said letter is annexed and marked as Exhibit ‘NM 1.’*

5. *the DPP sought certain clarifications in his letter of 11<sup>th</sup> February 2016, referred to above, and the nature of the details of the proposal.*

6. *that Fred Ojiambo, SC, responded to the DPP’s letter vide his letter dated 31<sup>st</sup> March 2016 and Mary Muigai of Muigai Kemei & Associates also responded vide their letter dated 7<sup>th</sup> March 2016. The two letters are annexed and marked exhibit ‘NM 2” and ‘NM 3’ respectively.*

7. *That in interested party proposed to settle the criminal case by way of a withdrawal of the criminal charges with an offer of payment of Kshs10 million which was accepted by the petitioner who is the widow tot the deceased Ishamel Mwikwiri Rintari.*

8. *that the DPP gave consideration to the proposal and responded vide his letter of 28<sup>th</sup> April 2016, indicating that the proposal was not acceptable by outlining his reasons and directing that the criminal case [proceed to its logical conclusion. The said letter is annexed and marked as Exhibit ‘NM 4’.*

9. *That causing death by dangerous driving is a serious traffic offence which attaches significant public interest. The traffic case has also commenced and one witness has already testified. The withdrawal of a criminal case once commenced can only be withdrawn by the DPP as the complainant who represents the state and the larger public interest. It is with this in mind and bearing the responsibility attached to the Office of the DPP under Article 157(11) of the Constitution, that the DPP does not find favour with the proposed settlement in terms of a plea agreement as per the terms of section 137A(1)(b) of the Criminal Procedure Code.*

10. *That the contrary to the suggestion by Learned Senior Counsel in his affidavit dated 14<sup>th</sup> July 2016, the DPP is not and cannot compel the interested party to plead guilty to the offence with which he is already charged or any other offence for that matter.*

11. *that I believe this insistence on restorative justice is not sincere and is intended for the interested party to avoid a criminal record in case of a conviction at the end of the trial and it is for this reason that the interested party insists on a withdrawal or termination of the traffic case upon payment of the Kshs10 million. Indeed regardless of the traffic case, the victim(s) can still lodge a civil claim against the interested party.”*

5. On his part, the Interested Party supported the Petition by an affidavit sworn by his Counsel, setting out his case at paragraphs 2 – 13 thereof, as follows:

**“REPLYING AFFIDAVIT OF FRED N’CRUBA OJIAMBO DATED 14<sup>TH</sup> JULY 2016**

2. *That the contents of paragraph 3 of the Petition are true. The Interested Party maintains his plea of not guilty to the charge of causing death by dangerous driving and confirms that the responses to entreaties by the petitioner and all the discussions and agreements reached are, and have always been entirely on a without prejudice basis and should not be considered to amount to any admission of involvement in any collision with the deceased, or of guilt or liability whatsoever in respect of the incident which culminated in his arraignment before court and the charge against the Interested Party in the said Traffic Case.*

3. *That the genesis of the discussion between the petitioner and the Interested Party was the sense of frustration which the Interested Party felt by the manner in which the prosecution of the case was being undertaken in a matter in which he felt no culpability whatsoever. This caused him to instruct me to write to the prosecution on 24<sup>th</sup> August 2015 requesting that, in the interests of justice the prosecution should consider another way of addressing the matter. Annexed hereto marked “FNO1” is a true file copy of my letter dated 24<sup>th</sup> August 2015.*

4. *That not having received any response to that letter, the petitioner’s counsel and I made a joint approach to the Director of Public Prosecutions by the letter dated 25<sup>th</sup> September 2015, a true Xerox Copy whereof is annexed hereto and marked “DNO2”.*

5. *That by his letter of 1<sup>st</sup> October 2015, one Nicholas K Mutuku, the Acting Deputy Director of Public Prosecutions, acting for the Director of Public Prosecutions, sought information from the Assistant Director of Public Prosecutions in the letter dated 1<sup>st</sup> October 2015. (sic)*

6. *That in pursuit of the matter, not having heard further from the Director of Public Prosecutions, the petitioner’s counsel wrote to the Director of Public Prosecutions on 12<sup>th</sup> January 2016 seeking greater clarity by the Director of Public Prosecution to facilitate the consent. Annexed hereto and marked “FNO3” is a true xerox copy of the said letter.*

7. *That, as there was no response to either our joint letter of 25<sup>th</sup> September 2015 or the Petitioner’s lawyers of 12<sup>th</sup> January 2016, I wrote to the Director of Public Prosecutions, seeking further assistance in my letter dated 10<sup>th</sup> February 2016 a true Xerox copy whereof is annexed hereto and marked “FNO4”. The petitioner’s lawyers also wrote on 7<sup>th</sup> March 2016 a copy whereof is annexed hereto marked “FNO5”. That letter was in response to the Director of Public Prosecution’s letter dated 11<sup>th</sup> February, 2016 a copy whereof is annexed hereto and marked “FNO6”.*

8. *That from the Director of Public Prosecution’s response, it seemed clear that the Director of Public Prosecutions wanted to be certain that members of the deceased person’s family would be catered for in the settlement. He was also concerned that the letters of administration were not contested or contestable. And, finally, the Director of Public Prosecutions wished the accused to invoke the*

provisions of section 137 of the Criminal Procedure Code to enter into a plea agreement.

9. That on 31<sup>st</sup> March 2016 I wrote back the Director of Public Prosecutions in response to that letter, as per the annexed copy of the letter marked "FNO7".

10. That in response thereto, the Director of Public Prosecutions wrote on 28<sup>th</sup> April 2015 rejecting the proposal of settlement for the reasons inter alia that the Interested Party was not prepared to plead guilty to the offence in the traffic case. A true Xerox copy of the letter is annexed hereto and marked "FNO8".

11. That it would appear that the terms on which the Director of Public Prosecutions will allow a settlement between the Petitioner and Interested Party is where the Interested Party pleads guilty to an offence in respect of which he has denied liability. **This amounts to the director of Public Prosecutions compelling the Interested Party to change his plea in direct violation of Articles 50(2)(a) and (k) of the constitution.**

12. That the stance of the director of Public Prosecutions amounts to blackmail upon the Interested party and is an abuse of the power granted under Article 157 of the Constitution and particularly the violation of the duties conferred upon him by article 157(11) of the Constitution.

13. That while the Director of Public Prosecution has the right to exercise the power donated by Article 157 of the Constitution, it is difficult to see what interests of administration of justice are served by insisting on prosecution for its own sake, without the likelihood of any direct or indirect, benefit to the deceased person's family."

6. Counsel for the Parties – Mrs Muigai for the Petitioner, Mr. Okello for the Respondent and Senior Counsel Ojiambo – then made oral submissions on the Petition and Judgment was reserved.

### **THE RESPECTIVE CASES FOR THE PARTIES**

7. The petitioner asserts restorative justice under Article 159 of the Constitution provision for alternative dispute resolution and presents her claim as a legal representative of the Estate by virtue of Letters of Administration of 3<sup>rd</sup> November 2014 claiming that she and her mother in law are the only surviving dependants of her deceased husband and that they have accepted a total sum of Ksh.10,000,000/- in settlement with the Interested Party and pray that the DPP who have refused to accept the settlement be compelled by the Court to terminate the traffic offence case against the Interested Party.

8. The Petitioner cites in addition to Article 159, section 137A (1) (b) and (2) of the Criminal Procedure Code and section 15(1), (2) and (3) of the Victim Protection Act. On a balance of convenience consideration the petitioner contends that "*I have nothing to gain with the criminal trial which only leads me to revisit the traumatic events of my husband's and children's deaths. Conversely, the proposed payment of Ksh.10,000,000/- by the Interested Party will enable my mother in law and I to move on and rebuild our lives.*"

9. The Interested Party supports the Petition and contends that the insistence by the DPP on a plea of guilty by the Interested Party for the offence that he has denied as a condition for approving the settlement is a blackmail and an abuse of power under Article 157 of the Constitution and a violation of the Interested Party's right to fair trial under Article 50 of the Constitution. The decisions of **R v. Mohamed Abdow Mohamed** (2013) eKLR where the Court permitted settlement out of court of more serious charge of murder; **Rosemary Wanja Mwangiri & 2 Ors. v. Attorney General and 3 Ors.** (2013) eKLR and **Investments & Mortgages v. Commissioner of Police and Ors.** (2013) eKLR as authorities

on criminal prosecution as abuse of process of the Court, are cited.

10. The Respondent contended that the DPP while accepting restorative justice as a means of dispute resolution was bound by the Constitution under Article 157 to consider public interest; that the offence of causing death by dangerous driving was a serious offence and it was not consistent with larger public interest to permit its withdrawal in terms of section 137A (1) (b) of the Criminal Procedure Code. It was contended that the settlement was insincere and only calculated to avoid a criminal conviction for the Interested Party because with or without the settlement the petitioner could still lodge a civil claim against the Interested Party. The decision of the High Court in ***Director of Public Prosecutions v. Nairobi Chief Magistrate's Court & Anor.*** Petition No. 21 of 2015 was cited.

### **ISSUES FOR DETERMINATION**

11. Although it is accepted that restorative justice may be permitted as a method of alternative dispute resolution in criminal justice, the Court must make a determination-

- a. Whether the Director of Public Prosecution is in breach of the Interested Party's fair trial rights in instance on a plea of guilty as a condition for the settlement of the criminal case; and
- b. Whether the Director of Public Prosecutions is in abuse of process by continuing with the criminal prosecution of the traffic case in this matter.

12. On resolution of these issues the Court will then consider whether or not to grant the reliefs sought in the Petition.

### **DETERMINATION**

#### ***Restorative Justice***

13. The course of justice is not a strait for prosecution-only remedy. It is a composite of factors, varying according to the case at hand, for the consideration justice of the case. It is a determination for which the interests of justice to the victim, to the society and to the perpetrator coincide. The Constitution of Kenya 2010 has entrenched and given constitutional underpinning to reconciliation and restorative justice as some of the methods of justice and alternative dispute resolution.

14. Section 2 of the Victim Protection Act No. 17 of 2014 defines restorative justice -

***"restorative justice" includes –***

***(a) the promotion of reconciliation, restitution and responsibility through the involvement of the offender, the victim, their parents, if the victim and offender are children, and their communities; or***

***(b) a systematic legal response to victims or immediate community that emphasises healing the injuries resulting from the offence;"***

15. Previously the Criminal Procedure Code cap. 75 has permitted reconciliation through the instrumentality of section 176 on reconciliation and section 204 on withdrawal of complaint by the complainant. The two sections of the Criminal Procedure Code provide as follows:

**“176. Promotion of reconciliation**

***In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.***

**204. Withdrawal of complaint**

***If a complainant, at any time before a final order is passed in a case under this Part, satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused.”***

16. Now, Article 159 of the Constitution of Kenya 2010 provides as follows:

***“159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.***

***(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—***

***(a) justice shall be done to all, irrespective of status;***

***(b) justice shall not be delayed;***

***(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);***

***(d) justice shall be administered without undue regard to procedural technicalities; and***

***(e) the purpose and principles of this Constitution shall be protected and promoted.***

***(3) Traditional dispute resolution mechanisms shall not be used in a way that—***

***(a) contravenes the Bill of Rights;***

***(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or***

***(c) is inconsistent with this Constitution or any written law.”***

17. I would agree with Counsel for the Interested Party that “*the Constitution of Kenya 2010 recognises that justice is not only about prosecution, conviction and acquittals [and that] it reaches out to issues of restoration of the parties [with] court assisted reconciliation and mediations are the order of the day with Article 159 being the basic test for that purpose.*”

18. Accordingly, Alternative Dispute Resolution (ADR) “***including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms***” are available means of settlement of criminal cases under the Constitution, and the Court is enjoined Article 159 to promote ADR.

**Factors to be considered**

19. Although, the restriction on application to cases of personal nature or other non-aggravated cases in section 176 is not repeated in Article 159 of the Constitution, save in respect of the Traditional Dispute Resolution Mechanisms which are required to be consistent with the Constitution or any written law, the parameters under Article 157 (11) for the exercise by DPP of the prosecutorial mandate import considerations of “**the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process**” in determining whether ADR is applicable in a particular case.

20. The nature of the charges in the criminal matter and its effect on society are important factors. In a case where the Court considered that “*the nature of corruption and bribery is that they are indeed crimes against the entire population in Kenya*”, Lenaola, J. (as he then was) in **DPP v. Nairobi Chief Magistrate’s Court and Anor**. Pet. No. 21 of 2015 held that –

*“Although ADR serves as an avenue for resolution of contentious matters, including criminal matters, reconciliation cannot possibly apply to circumstances whereby the crimes that an accused has been charged with affect more than the person who reported them. In this case, reconciliation between the two persons does not engender effective and just resolution of the matter. More importantly, such resolution goes against the Constitution, which espouses integrity, accountability and social justice.”*

I respectfully agree.

21. The earlier case of **R. v. Mohamed Abdow Mohamed** (2013) eKLR (R. Lagat Korir, J.) where the DPP made an oral application for withdrawal of a charge of murder following the settlement of the matter between the families of the deceased and the perpetrator of the killing had settled the matter by payment of compensation in accordance with Islamic laws and customs must be understood within its own facts as the judge herself considered it a unique case, as follows:

*“[Prosecution Counsel] then proceeded on the instructions of the Director of Public Prosecutions to make an oral application in court to have the matter marked as settled. He cited **Article 159 (1)** of the Constitution which allows the Courts and Tribunals to be guided by alternative dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. He urged the court to consider the case as ‘sui generis’ as the parties had submitted themselves to traditional and Islamic laws which provide an avenue for reconciliation. He stressed that each of the parties was satisfied and felt adequately compensated.*

*Finally, Counsel submitted that since the time of arrest of the accused, the prosecution had had great difficulty in securing the attendance of witnesses as the said witnesses were not only no longer interested in the prosecution but were actually eager to see the matter marked settled. He drew the court’s attention to the affidavit of Abdow Alio Ibrahim, the deceased’s father which in part reads:-*

*“.....its worth noting that it goes against our tradition to pursue the matter any further and/or testify against the accused person once we have received full compensation in the matter of which we already have..... its our instruction that the matter and/or court case be withdrawn as our family wishes to put a stop to the matter.”*

*I have considered the application. Under **Article 157** of the Constitution the Director of Public Prosecution is mandated to exercise state powers of prosecution and in that exercise may discontinue at any stage criminal proceedings against any person. In the unique circumstances of the present application, I am satisfied that the ends of justice will be met by allowing rather than disallowing the application. Consequently, I discharge the accused.”*



**Abuse of criminal process**

22. I respectfully agree with Mumbi Ngugi, J. and Majanja, J., respectively in ***Rosemary Wanja Mwangiru & 2 Ors. v. AG & 3 Ors.*** (2013) eKLR and ***Investment and Morgages Bank Limited (I&M) v. The Commissioner of Police & Others*** (2013) eKLR that abuse of process of the Court is one of the parameters that the court may use to gauge whether the DPP is exercising his powers within the Constitutional mandate of Article 157 of the Constitution and that it is an abuse of process of the Court to use criminal proceedings to perpetuate injustice and for improper motives.

23. As relevant, Article 157 on role of the Office of the Director of Public Prosecution (DPP) provides as follows:

***“157. (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.***

**DPP’s Objection to the terms of settlement**

24. By its letter dated 28<sup>th</sup> April 2016 the Office of the DPP demonstrated its objection to the settlement and its terms as follows:

**“OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

Ref No ODPP/CAM/3/115(8)

Date 28<sup>th</sup> April 2016

M/s Kaplan & Stratton Advocates

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P O Box 40111-00100

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M/s Muigai, Kemei & Associates Advocates

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Argwing Kodhek road

**Nairobi.**

Att: Fred N Ojiambo, NBS, SC

Ms. Mary W Muigai

**RE: CMTR CASE NUMBER 13686 OF 2014**

**REPUBLIC –VS- RAGHUNATHAN SANTOSH**

Reference is made to the above matter and your letters addressed to us ref. No FNO/CO/2/257 dated 31<sup>st</sup> March 2016 and ref. No MKA/LT/IR/16/14 dated 7<sup>th</sup> March 2016. I have been directed by the Director of Public Prosecutions to acknowledge receipt hereof.

That we appreciate your response to our letter of request for clarification regarding a request by yourselves to us for concurrence with the proposed settlement offered in pursuit of restorative justice, facts of which are well within your knowledge.

The DPP having carefully studied and considered the facts of the referenced criminal case; the nature and circumstances surrounding the proposed settlement; and your input or clarifications on the same proposal; has instructed the undersigned to address you as hereunder:

1. That it now remains unknown to the DPP as to whether there are any other surviving relatives to the deceased, ISHMAEL MWIKWIRI RINTARI, apart from the deceased's widow and mother.
2. With respect to the limited grant of letters of administration ad-litem, it cannot be said that the widow, who now holds the limited grant, represents the interests of the estate as regards the proposed restorative justice process. The limited grant is only for purposes of suing and being sued and not for managing the estate of the deceased by receiving sums of money that may fall due to the estate.
3. The above notwithstanding, it is not clear whether the widow would receive the sums of money in her personal capacity as a victim or on behalf of the estate of the deceased.

4. As regards the conduct of the criminal case against the accused, and the probable entry into a plea agreement, it has been expressly stated that the accused will only enter into a plea agreement as per the terms of section 137A (1)(b) of the Criminal Procedure Code. This conduction is regrettably frowned upon by the DPP.

Conclusively, the DPP is not satisfied that the capacity of the victim(s) ascertained and/or that their interests are clear, unequivocal, well spelt out and secured.

In light of the above, the DPP disapproves the proposed settlement offered in pursuit of restorative justice, but without prejudice to the right of the Victim(s), including MARY KINYA RUKWARU, to seek appropriate relief in civil proceedings

In the circumstances the criminal case should proceed to its logical conclusion.

**NICHOLAS K. MUTUKU**

**Ag. DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS**

**FOR: THE DIRECTOR OF JUSTICE PROSECUTIONS**

Cc. Mr Daniel Karuri

Asst. Director of Public Prosecutions

Milimani Law Courts

Room 67, Ground Floor

**Nairobi.**

25. Section 137A of the Criminal Procedure Code is in terms as follows:

**“137A. Plea agreement negotiation**

(1) Subject to section 137B, a prosecutor and an accused person or his representative may negotiate and enter into an agreement in respect of—

(a) reduction of a charge to a lesser included offence;

**(b) withdrawal of the charge or a stay of other charges or the promise not to proceed with other possible charges.**

(2) A plea agreement entered into under subsection (1)(a) or (b) may provide for the payment by an accused person of any restitution or compensation.

(3) A plea agreement under subsection (1) shall be entered into only after an accused person has been charged, or at any time before judgement.

(4) Where a prosecution is undertaken privately no plea agreement shall be concluded without the written consent of the Director of Public Prosecutions.

[Act No. 12 of 2012, Sch.]”

26. The Court cannot compel parties to a criminal prosecution, or indeed any litigation, to enter into an agreement with relation to any proceedings before it. Indeed, section 137C keeps the Court out of the initiation and negotiation of plea bargain as follows:

**“137C. Initiation of plea agreement**

(1) An offer for a plea agreement may be initiated by—

(a) a prosecutor; or

(b) an accused person or his legal representative.

(2) The court shall be notified by the parties referred to in subsection (1) of their intention to negotiate a plea agreement.

**(3) The court shall not participate in plea negotiation between a public prosecutor and an accused person under this Part.”**

27. I consider that the DPP’s query as to existence of other victims in this case is **bona fide**. In seeking clarification as to other dependants of the deceased persons, the DPP was only complying with section 137D (c) under which he is required to consult the victim or his personal representative before entering into plea bargain, as follows:

**“137D. Consultation with victim, etc.**

A prosecutor shall **only** enter into a plea agreement in accordance with section 137A—

(a) after consultation with the police officer investigating the case;

(b) with due regard to the **nature of and the circumstances relating to the offence, the personal circumstances of the accused person and the interests of the community;**

(c) **unless the circumstances do not permit, after affording the victim or his legal representative the opportunity to make representations to the prosecutor regarding the contents of the agreement.”**

To similar effect, as shown in the definition of restorative justice under section 2 of the **Victim Protection Act**, No. 17 of 2014, the process of restorative justice provides for involvement of the victims, their family and community.

28. A plea agreement or process of restorative justice is matter of negotiation between the accused, the victim and the prosecution; it must be voluntary, driven by the parties without instigation or involvement of the Court and neither the accused nor the victim is obliged to seek it. Having sought plea bargain, the accused or the victim must contend with the position taken by the DPP in compliance with the applicable provisions of law set out above. Section 15 of the Witness Protection Act further acknowledges situations “*where a process for restorative justice fails, the criminal trial of the offender shall proceed to final determination, but without prejudice to the right of the victim to seek appropriate relief in civil proceedings*”.

29. Section 15 of the Act provides in full as follows:

*"15. (1) A victim has a right to restorative justice.*

*(2) Where the victim elects to participate in any process towards restorative justice, the process shall proceed on condition that-*

*(a) the participation of the offender shall not prejudice any of the offender's rights under any law or be deemed as evidence of admission or proof of guilt in respect of the offence complained of;*

*(b) any of the parties may withdraw their participation to the process at any time;*

*(c) where a process for restorative justice fails, the criminal trial of the offender shall proceed to final determination, but without prejudice to the right of the victim to seek appropriate relief in civil proceedings; and*

*(d) The process towards restorative justice does not violate the provisions of Article 159(3) of the Constitution.*

*(3) Any agreement for restoration or other redress agreed between the victim and the offender shall be recorded and enforced as an order of the Court and may be enforced as a decree of the Court.*

*(4) Any restorative justice process shall be for a period of six months and may only be extended with the leave of the court."*

30. For the foregoing reasons, the accused or the victim cannot insist on an unconditional withdrawal of the charges against the accused as a condition of the plea bargain or restorative justice. I do not find that the DPP has in any way breached the Interested Party's right to a fair trial under Article 50 of the Constitution. All the prosecution has done is to insist that the accused's trial proceed to "its logical conclusion", and this is within its rights under section 15(2) (b) of the Witness Protection Act.

### **Public interest in the matter**

31. The traffic offence charge of causing death by dangerous driving is no doubt a serious offence. It involves more than the persons directly affected by the offence. It involves the whole society, which suffers the consequences of deaths by of dangerous driving. It is understandable that the DPP is opposed to termination of the matter on the basis of a withdrawal of the charge preferring rather a prosecution and determination of the guilt of accused upon full trial.

32. In this case, there is no issue of lack of prosecution witnesses as in the case of **R v. Mohamed Abdow Mohamed**, supra, and indeed one witness has already testified.

### **CONCLUSION**

33. The petitioner has not proved that the Respondent has unjustifiably and unreasonably refused to approve the reconciliation proposed in the matter or that he is by insisting on continued prosecution of the Interested Party abusing the criminal process of the Court in breach of his constitutional mandate under Article 157 (11) of the Constitution and she is consequently not entitled to the reliefs sought and the petition will therefore be declined.

**ORDERS**

34. Accordingly, for the reasons set out above, the Petition dated 5<sup>th</sup> July 2016 is declined with costs to the Respondent.

**DATED AND DELIVERED THIS 17<sup>TH</sup> DAY OF NOVEMBER 2016.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES:**

M/S MUIGAI KEMEI & Associates, Advocates for the Petitioner

Mr. Mutuku & Mr. Okello for the Respondent.

M/S Kaplan & Stratton, Advocates for the Interested Party.



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