

(Legislative Supplement No. 6)

LEGAL NOTICE NO. 47

THE CRIMINAL PROCEDURE CODE

(Cap. 75)

IN EXERCISE of the powers conferred by section 137O of the Criminal Procedure Code, the Attorney-General makes the following rules—

**THE CRIMINAL PROCEDURE (PLEA BARGAINING) RULES,
2018**

1. These rules may be cited as the Criminal Procedure (Plea Bargaining) Rules, 2018.

Citation.

2. A plea agreement may be entered into between the prosecutor and an accused person where—

Plea agreement.

- (a) an accused person has been charged in court; and
- (b) at any time before the court passes judgment.

3. The information obtained from an accused person during the course of plea negotiations shall not be used against him or her during the prosecution of the case if the plea negotiations are ultimately unsuccessful:

How to handle information obtained from an accused person.

Provided that where the failure of plea negotiations is on account of an act or omission by the accused person, the information obtained during plea negotiations may be used during the prosecution of the accused person.

4. (1) A private prosecutor shall notify the Director of Public Prosecutions in writing fourteen days prior to the commencement of his or her intention to enter into plea negotiations with an accused person.

Private prosecutor may enter into plea negotiations.

(2) The notification required under subrule (1) shall be accompanied by all relevant materials the private prosecutor intends to rely on in the negotiation process.

(3) Where plea negotiations between a private prosecutor and an accused person are successful, the private prosecutor shall notify the Director of Public Prosecutions of the outcome within seven days and supply the relevant materials relied on during the plea negotiations and a copy of the draft plea agreement.

(4) Where the Director of Public Prosecutions approves a plea agreement between a private prosecutor and an accused person, the Director of Public Prosecutions may, within thirty days of being notified under subrule (3), authorise in writing the private prosecutor to lay the agreement before the court.

5. A prosecutor shall obtain written approval from the Director of Public Prosecutions or from a person authorised in writing by the Director of Public Prosecutions in this regard before entering into a plea agreement with an accused person.

Approval of plea agreement.

6. Plea negotiations may be initiated by a prosecutor or the accused person or the accused person's representative. Initiation of plea negotiations.

7. (1) Before entering into a plea agreement with an accused person, the prosecutor shall— Consultations by prosecutor.

(a) consult with the investigating officer of the case;

(b) give due regard to the nature of and the circumstances relating to the case, the personal circumstances of the accused, the interests of the community; and

(c) unless the circumstances do not permit, afford the victim or the victim's legal representative an opportunity to make a representation to the prosecutor regarding the terms of the agreement.

(2) Despite the provisions of subrule (1), the prosecutor shall maintain the sole discretion on whether or not to enter into a plea agreement with the accused person.

8. (1) A plea agreement may include a clause for the payment of compensation to a victim by an accused person. Compensation.

(2) Where a plea agreement includes a clause for compensation payable to the victim by an accused person, the value or form of compensation shall be as agreed to after negotiations between the victim and the accused person and endorsed by the prosecutor if, in his or her opinion, the compensation serves the ends of justice.

(3) A proposal to include the payment of compensation to the victim in a plea agreement or any negotiation for compensation payable to the victim may be made or initiated by the accused person or the victim.

(4) Where negotiations for compensation payable to the victim break down or the prosecutor determines that the proposed compensation defeats the ends of justice, the prosecutor shall not include the proposal for compensation in the final draft of the plea agreement.

9. (1) A plea agreement shall be in the form set out in the Schedule to these rules and shall comply with the provisions of sections 137E and 137F of the Criminal Procedure Code. Forms.

(3) Notwithstanding the provisions of subrule (1), the Director of Public Prosecutions may develop other forms for use in drafting plea agreements:

Provided that any other forms developed by the Director of Public Prosecutions shall comply with the provisions of sections 137E and 137F of the Criminal Procedure Code.

10. The prosecutor shall present the court with the factual basis of a plea set out in the plea agreement between the office of the Director of Public Prosecutions and the accused person by laying before the court the final plea agreement at the hearing where the accused person pleads guilty in accordance with the terms of the plea agreement. Factual basis.

11. (1) The prosecutor shall present to the court all circumstances of the case including any mitigating circumstances in favour of the accused person at the hearing where the accused person pleads guilty in accordance with the terms of the plea agreement.

Mitigating
circumstances.

(2) The prosecutor shall, at the time that the accused person pleads guilty, call the court's attention to section 1371 of the Criminal Procedure Code and the Sentencing Policy Guidelines, 2016.

12. (1) A prosecutor and the accused person or his or her legal representative may each make a specific recommendation to the court as to the sentence to be imposed and include the recommendation in the final plea agreement.

Sentencing
recommendations.

(2) Notwithstanding the recommendation of the parties, the court shall retain sole discretion in sentencing.

(3) Where the prosecutor recommends to the court the imposition of a sentence that is more severe than the recommendation included in the plea agreement under subrule (1), the accused person may withdraw his or her plea of guilty and set aside the plea agreement.

(4) Where the accused person recommends to the court the imposition of a sentence that is less severe than the recommendation in the plea agreement, the accused person shall not be permitted to withdraw his or her plea of guilty on that ground alone.

(5) Where the accused person recommends to the court the imposition of a sentence that is less severe than the recommendation in the plea agreement, the prosecutor may recommend to the court any other appropriate sentence.

13. (1) Where the accused person is not represented by a legal representative, the prosecutor shall inform him or her of his or her right to have a legal representative or any other party of his or her choice.

Representation.

(2) Where the accused person is a child who has a legal representative, the plea agreement shall be executed by the prosecutor, the child and the child legal representative.

Provided that the court shall ascertain the competency of the child to enter into the plea agreement through *voire dire* examination.

14. (1) A plea agreement shall be finalised when the prosecutor and the accused person sign the agreement.

Finalisation of
agreement.

(2) Where applicable, the legal representative shall also sign the plea agreement.

(3) Where the plea agreement includes a compensation clause, the complainant shall sign the compensation clause of the agreement.

REPUBLIC OF KENYA
IN THE _____ COURT AT _____
CRIMINAL CASE NO. _____ OF 20____
REPUBLIC
-VERSUS-

THE ACCUSED
PLEA AGREEMENT

Pursuant to Section 137A-O of the Criminal Procedure Code, Cap 75 Laws of Kenya, the Accused, _____ agrees as follows:

1. The Accused enters into this Plea Agreement and pleads guilty freely, voluntarily, without threat, force, intimidation, or coercion of any kind and without promise or benefit of any kind, other than as contained herein. **Court :** _____ **Accused:** _____
Interpreter: _____

2. The Accused knowingly, voluntarily and truthfully admits the facts contained herein. **Court :** _____ **Accused:** _____
Interpreter: _____

3. The Accused pleads guilty to the offence of _____ contrary to **SECTION** _____ of the **PENAL CODE CAP** _____ **OF THE LAWS OF KENYA** **Court :** _____ **Accused:** _____ **Interpreter:** _____

4. The Accused understands every element of the offense to which the Accused is pleading guilty, and that the maximum potential penalty for that offense is _____.
Court : _____ **Accused:** _____
Interpreter: _____

5. Upon acceptance by the Court, and fulfillment by the Accused of all terms and conditions of the Plea Agreement, the Republic agrees the Accused will face no other charges known to the Republic as a result of the instant investigation. **Court :** _____
Accused: _____ **Interpreter:** _____

6. The Accused understands and agrees this Plea Agreement is limited to the criminal charges listed herein and is not a waiver, settlement or compromise of any civil or administrative remedies that may be available to the victim, the government, or any other agency or authority and that if the Court rejects the plea of guilty, this Plea Agreement shall be rendered null and void and no party shall be bound by it.
Interpreter: _____ : _____ **interpreter:** _____ **Court :** _____ **Accused:** _____

7. The Accused has been advised by his/her legal representative [initial here if applicable _____] and the Court, of his/her Constitutional rights, including the right to trial, the right to examine and cross-examine witnesses, and the Accused being well informed, has knowingly and voluntarily waived these rights, including the right to appeal, and agreed to enter a plea of guilty as set forth in this Plea Agreement. **Court :** _____ **Accused:** _____ **Interpreter:** _____

8. Had the case gone to trial, the Prosecution would have presented evidence sufficient to prove the following facts beyond a reasonable doubt:

_____ [Continued on Form 2

9. The Accused shall at all times give complete, truthful, and accurate information and testimony, and agrees not to undertake any act in furtherance of the instant offense, and understands this Plea Agreement does not protect him/her from prosecution related to any new offense. Failure by the Accused to comply with the terms and conditions of this Plea Agreement will permit the Republic to fully prosecute the Accused on all criminal charges that may be brought against him/her.

Court : _____ **Accused:** _____ **Interpreter:** _____

10. The Prosecution may, before sentence is passed, submit a Victim Impact Statement or any such evidence pursuant to Section 329 of the Criminal Procedure Code as it deems fit in order to inform the Court as to the proper sentence to be passed, and the Prosecution shall also present to the Court any circumstances of the case including mitigating circumstances in favor of the Accused before sentence is passed.

Interpreter: _____

Court : _____ **Accused:** _____

11. The Accused understands that the sentence to be imposed upon conviction on his/her plea of guilty is within the sole discretion of the Court. At sentencing, the prosecutor will recommend _____. At sentencing, the accused will recommend _____.

Interpreter: _____

Court : _____ **Accused:** _____

12. The Accused understands and agrees no promises, agreements and/or conditions have been entered into regarding the charges herein other than those expressly set out in this Plea Agreement and none shall be entered into, or shall be binding upon the Accused and/or the Prosecution, unless expressly set forth herein, in writing, and signed by the Accused (in the presence of his/her legal representative [initial here if applicable _____]) and the Prosecution.

Court : _____ **Accused:** _____ **Interpreter:** _____

I admit the facts contained in the Plea Agreement, which has been explained to me in a language I understand, and fully understand the contents of the Plea Agreement. I plead guilty to the charge, and every element set out in the Plea Agreement, because I am guilty. I do this knowingly, freely and voluntarily, and without any threat, force, intimidation, or coercion of any kind.

Accused: _____ **Representative:**

Interpreter: _____ **Date:** _____

This Plea Agreement has been approved by the Office of the Director of Public Prosecutions after consultation with the investigating officer(s), any Victim(s), and is being done in the interests of justice after considering all the relevant facts and circumstances.

Prosecution Counsel: _____

Date: _____

Entirety of Plea Agreement: Yes No **Additional provisions of this Plea Agreement are included on the attached Form 2:** Yes No

REPUBLIC OF KENYA
IN THE _____ COURT AT _____
CRIMINAL CASE NO. _____ OF 20____

ODPP/PA/FORM ONE
(Under rule 9) Page 2

REPUBLIC
-VERSUS-

THE ACCUSED
PLEA AGREEMENT

Continuation from Page 1: [Check if applicable:]

Had the case gone to trial, the Prosecution would have presented evidence sufficient to prove the following facts beyond a reasonable doubt:

Agreement to Cooperate: [Check if applicable:]

The Accused agrees to provide entirely truthful, complete and accurate information and agrees to fully cooperate with the Court. The cooperation required shall include:

- 1. The accused submitting to an interview by a Children’s Officer, Probation Officer, or any other officer as may be ordered by the Court pursuant to this agreement.
 - 2. The accused shall disclose any information and materials that may be in his possession that may lead to the fair determination of the matter herein.
 - 3. The Accused shall demonstrate good behavior and shall remain arrest free at all times.
 - 4. The Accused shall not possess or consume any alcoholic beverages or any substance or thing determined to be illegal under the law.
 - 5. The Accused shall attend and meaningfully participate in any treatment and/or counseling as may be ordered by the Court.
 - 6. The Accused shall not possess, transport and/or control any weapon, explosive device or firearm.
 - 7. The Accused shall immediately inform his/her legal counsel or Probation Officer, of any subsequent arrest, summons and/or questioning by any law enforcement agency.
 - 8. The Accused shall inform his/her legal counsel or Probation Officer of any change of address or telephone number within 24 hours of said change.
 - 9. The Accused shall not associate himself/herself with any person or be in any place in violation of this Plea Agreement or in violation of the orders of the Court.
 - 10. The Accused shall maintain good behavior at all times.
 - 11. The Accused shall comply with all court orders.
 - 12. The court may impose part or all of the conditions herein as well as other terms and conditions as the Court may deem appropriate.
 - 13. Additional conditions:
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Compensation/Restitution: [Check if applicable:]

The parties, both the Prosecution and the Accused, agree:

1. The victim of this offense is _____ who is the complainant herein.
2. The loss suffered by the victim as a result of the offense complained of amounts to _____ Kenya shillings (Ksh).
3. The Accused has agreed to compensate the victim \$ _____ Ksh being the financial loss sustained by the complainant.
4. Payment of the _____ Ksh shall be made in _____ (weekly/monthly/quarterly) installments until paid in full.

i, _____, the Accused, understand the above noted compensation/restitution agreement and freely and voluntarily agree to abide by the same.

Accused: _____ **Interpreter:** _____ **Prosecution Counsel:** _____

Dated the 14th February, 2018.

GITHU MUGAI,
Attorney-General.