

THE CRIMINAL PROCEDURE CODE (AMENDMENT) ACT

No. 11 of 2008

Date of Assent: 24th December, 2008

Date of Commencement: 30th December, 2008

AN ACT of Parliament to amend the Criminal Procedure Code to make provision for plea agreements, to provide for the procedure for making such agreements and for connected purposes

ENACTED by the Parliament of Kenya, as follows –

1. This Act may be cited as the Criminal Procedure Code (Amendment) Act, 2008.

Short title.

2. Section 2 of the Criminal Procedure Code, in this Act referred to as “the principal Act”, is amended by inserting the following new definitions in their proper alphabetical sequence –

Amendment of section 2 of Cap. 75.

“prosecutor” means a public prosecutor or a person permitted by the court to conduct a prosecution under section 88 of the Act;

“plea agreement” means an agreement entered into between the prosecution and an accused person in a criminal trial in accordance with Part IV;

3. The principal Act is amended by inserting the following heading and new sections immediately after section 137 –

Insertion of sections 137A to 137O in Cap. 75.

PLEA AGREEMENTS

Plea agreement negotiation.

137A. (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 sub-section (1) shall be entered into only after an accused person has been charged, or at anytime before judgement.

(4) Where a prosecution is undertaken privately no plea agreement shall be concluded without the written consent of the Attorney-General.

Plea agreement on behalf of Republic.

137B. A plea agreement on behalf of the Republic shall be entered into by the Attorney-General, the Director of Public Prosecutions or officers authorised by the Attorney-General in accordance with section 26 (5) of the Constitution and any other person authorized by any written law to prosecute:

Provided that in any trial before a subordinate court, a public prosecutor may, with prior written approval of the Attorney-General, the Director of Public Prosecutions, or officers subordinate to him, as the case may be, enter into a plea agreement in accordance with section 137A (1).

Initiation of plea agreement.

137C. (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.

137D. A prosecutor shall only enter into a plea agreement in accordance with section 137A –

Consultation
with victim,
etc.

- (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.

137E. A plea agreement shall be in writing, and shall –

Form of plea
agreement.

- (a) be reviewed and accepted by the accused person, or explained to the accused person in a language that he understands;

- (b) if the accused person has negotiated with the prosecutor through an interpreter, contain a certificate by the interpreter to the effect that the interpreter is proficient in that language and that he interpreted accurately during the negotiations and in respect of the contents of the agreement;
- (c) state fully the terms of the agreement, the substantial facts of the matter and all other relevant facts of the case and any admissions made by the accused person;
- (d) be signed by the prosecutor and the accused person or his legal representative;
- (e) be signed by the complainant if a compensation order contemplated in section 175 (2) (b) has been included in the agreement.

Recording of
plea agreement
by court.

137F. (1) Before the court records a plea agreement, the accused person shall be placed under oath and the court shall address the accused person personally in court, and shall inform the accused person of, and determine that the accused person understands –

- (a) the right to –
 - (i) plead not guilty, or having already so pleaded, to persist in that plea;

- (ii) be presumed innocent until proved guilty;
 - (iii) remain silent and not to testify during the proceedings;
 - (iv) not being compelled to give self-incriminating evidence;
 - (v) a full trial;
 - (vi) be represented by a legal representative of his own choice, and where necessary, have the court appoint a legal representative;
 - (vii) examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution;
- (b) that by accepting the plea agreement, he is waiving his right to a full trial;
- (c) the nature of the charge he is pleading to;
- (d) any maximum possible penalty.

including imprisonment, fine, community service order, probation or conditional or unconditional discharge;

- (e) any mandatory minimum penalty;
- (f) any applicable forfeiture;
- (g) the court's authority to order compensation under section 175 (2) (b), restitution under section 177, or both;
- (h) that by entering into a plea agreement, he is waiving the right to appeal except as to the extent or legality of sentence;
- (i) the prosecution's right, in the case of prosecution for perjury or false statement, to use against the accused any statement that the accused gives in the agreement.

(2) The prosecutor shall lay before the court the factual basis of a plea agreement and the court shall determine and be satisfied that there exists a factual basis of the plea agreement.

Competence of accused to make a plea agreement.

137G. The court shall, before recording a plea agreement, satisfy itself that at the time the agreement was entered into, the accused person was competent, of sound mind and acted voluntarily.

Record of factual basis of plea.

137H. (1) Where the court accepts a plea agreement –

- (a) it shall enter the factual basis of the plea on record;

- (b) the agreement shall become binding upon the prosecutor and the accused;
- (c) the agreement shall become part of the record of the court.

(2) Where a plea agreement entered into in accordance with section 137 A (1) (a) is accepted by the court in accordance with this section, the court shall proceed to convict an accused person accordingly.

137I. (1) Upon conviction, the court may invite the parties to address it on the issue of sentencing in accordance with section 216.

Address by parties.

(2) In passing a sentence, the court shall take into account –

- (a) the period during which the accused person has been in custody;
- (b) a victim impact statement, if any, made in accordance with section 329C;
- (c) the stage in the proceedings at which the accused person indicated his intention to enter into a plea agreement and the circumstances in which this indication was given;
- (d) the nature and amount of any restitution or compensation agreed to be made by the accused person.

(3) Where necessary and desirable, the

court may in passing a sentence, take into account a probation officer's report.

Rejection of
plea agreement.

137J. (1) Where the court rejects a plea agreement –

- (a) it shall record the reasons for such rejection and inform the parties accordingly;
- (b) the plea agreement shall become null and void and no party shall be bound by its terms;
- (c) the proceedings giving rise to the plea agreement shall be inadmissible in a subsequent trial or any future trial relating to the same facts; and
- (d) a plea of not guilty shall be entered accordingly.

(2) Where a plea agreement has been rejected by the court and a plea of not guilty consequently entered, the prosecution may, upon being informed of the fact under subsection (1) (a), proceed to try the matter afresh before another court.

Provided that the accused person may waive his right to have the trial proceed before another court.

(3) Upon rejection of a plea agreement, there shall be no further plea negotiation in a trial relating to the same facts.

(4) Where the court has rejected a plea agreement under this section, no party shall

appeal against, or apply for a review of, the order of the court rejecting the agreement.

137K. An accused person may withdraw a plea of guilty pursuant to a plea agreement –

Withdrawal of plea.

(a) prior to acceptance of the plea by the court, for any reason; or

(b) after the court accepts and convicts on the plea, but before it passes a sentence, if the accused person can demonstrate, to the satisfaction of the court, a fair and just reason for requesting the withdrawal.

137L. (1) Subject to subsection (2), the sentence passed by a court under this Part shall be final and no appeal shall lie therefrom except as to the extent or legality of the sentence imposed.

Finality of judgement.

(2) Notwithstanding subsection (1), the Attorney-General, in the public interest and the orderly administration of justice, or the accused person, may apply to the court which passed the sentence to have the conviction and sentence procured pursuant to a plea agreement set aside on the grounds of fraud or misrepresentation.

(3) Where a conviction or sentence has been set aside, under sub section (2), the provisions of section 137J shall apply *mutatis mutandis*.

✓ **137M.** Notwithstanding anything contained in any written law for the time being in force, the statements or facts stated by an accused person in a plea agreement

Protection of plea agreement process.

shall not be used for any other purpose except for the purpose of this Part.

Application.	137N. This Part shall not apply to—
No. 3 of 2006	<p>(a) offences under the Sexual Offences Act, 2006;</p> <p>(b) offences of genocide, war crimes and crimes against humanity.</p>
Rules under this sub-Part.	137O. The Attorney-General may make rules for the better carrying into effect the provisions of this Part and such rules shall apply <i>mutatis mutandis</i> to prosecutions conducted under section 88 of the Act.
Amendment of section 207 of Cap. 75.	<p>4. Section 207 of the principal Act is amended –</p> <p>(a) in subsection (1), by deleting all the words appearing immediately after the word “whether” and substituting therefor the words “he pleads not guilty, guilty or guilty subject to a plea agreement”;</p> <p>(b) in subsection (2), by inserting the words “otherwise than by a plea agreement” immediately after the word “charge”.</p>
Repeal and replacement of section 281 of Cap. 75.	<p>5. The principal Act is amended by repealing section 281 and replacing it with the following new section –</p>
Plea generally and application of Part IVA.	281. (1) An accused person may plead not guilty, guilty, or guilty subject to a plea agreement.

(2) Where an accused person pleads guilty subject to a plea agreement, the provisions of Part IV relating to plea agreements shall apply accordingly.