

The Criminal Procedure Code (Amendment) Bill, 2007
**THE CRIMINAL PROCEDURE CODE (AMENDMENT) BILL,
2007**

A Bill for

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 –

Short title.

1. This Act may be cited as the Criminal Procedure Code (Amendment) Act, 2007.

Amendment of section 2 of Cap. 75.

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

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

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

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

PLEA AGREEMENTS

Plea agreement negotiation.

137A. (1) Subject to section 137B, a public 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;

The Criminal Procedure Code (Amendment) Bill, 2007

(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 anytime before judgement.

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:

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 public prosecutor; or
- (b) an accused person or his legal representative.

(2) The court shall not participate in

The Criminal Procedure Code (Amendment) Bill, 2007

plea negotiation between a public prosecutor and an accused person under this Part.

Consultation with victim, etc.

137D. A public prosecutor may, whenever practicable, 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) if the circumstances permit, after affording the victim or his legal representative the opportunity to make representations to the public prosecutor regarding the contents of the agreement.

Form of plea agreement.

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

- (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 public prosecutor through an interpreter, contain a certificate by the interpreter to the effect that he interpreted accurately during the

The Criminal Procedure Code (Amendment) Bill, 2007

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 public 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;

The Criminal Procedure Code (Amendment) Bill, 2007

- (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 witness 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 discharge;

The Criminal Procedure Code (Amendment) Bill, 2007

- (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 public 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;

The Criminal Procedure Code (Amendment) Bill, 2007

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

(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.

Address by parties.

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

(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.

The Criminal Procedure Code (Amendment) Bill, 2007

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

The Criminal Procedure Code (Amendment) Bill, 2007

order of the court rejecting the agreement.

Withdrawal of plea.

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

- (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.

Finality of judgement.

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.

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

Protection of plea agreement process.

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

The Criminal Procedure Code (Amendment) Bill, 2007

Application.

137N. This Part shall not apply to—

- No. 3 of 2006
- (a) offences under the Sexual Offences Act, 2006;
 - (b) such other offence as the Attorney-General may, by notice in the Gazette, exempt.

Rules under this sub-Part.

137O. The Attorney-General may make rules for the better carrying into effect the provisions of this Part.

Amendment of section 207 of Cap. 75.

4. Section 207 of the principal Act is amended –

- (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”;
- (b) in subsection (2), by inserting the words “otherwise than by a plea agreement” immediately after the word “charge”.

Repeal and replacement of section 281 of Cap. 75.

5. The principal Act is amended by repealing section 281 and replacing it with the following new section –

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

The Criminal Procedure Code (Amendment) Bill, 2007
agreements shall apply accordingly.

MEMORANDUM OF OBJECTS AND REASONS

This Bill seeks to amend the Criminal Procedure Code (Cap. 75) to make provision for plea agreements between the prosecution and the defence in criminal trials. Plea bargaining is a hallmark of many criminal justice systems and is an acclaimed means of bringing about an expeditious disposal of criminal cases and the attendant reduction in the backlog of cases in the judicial system. It also promotes efficiency and certainty in criminal trials as it is based on a mutually agreed mode of disposal of cases, and also cut down costs that would have otherwise been incurred in the event of a long-drawn, protracted trial.

Similarly, plea agreement is a novel way of tackling the new genre of emerging crimes, *inter alia*, corruption, electronically-aided fraud, terrorism, drug trafficking etc. that were not in contemplation when the Criminal Procedure Code was enacted. There is thus the need to bring the Code at par with the prevailing circumstances.

Currently, a system of plea agreement is not formally recognized under the legal system of Kenya and where conducted, it is done informally without explicit legal guidelines and structures being available to guide the process. The amendments proposed in this Bill therefore are aimed at entrenching the practice into Kenya's legal system for an efficient and effective criminal justice system. This will bring about faster disposal of cases which will in turn reduce the backlog of cases currently weighing heavily on the judicial system. The end result will be that the dispensation of justice on a timely basis will be assured and the consumers of justice, being the Kenyan public, will end up being the ultimate beneficiaries of an effective and efficient legal system while at the same time enhancing protection of human rights.

The following is an explanation of the specific amendments made by the Bill.

The Criminal Procedure Code (Amendment) Bill, 2007

The new sub -Part, consisting of sections 137A to 137O, provides for the concept of plea agreement in Kenya's criminal justice system.

The new section 137A enables the prosecution and defence to enter into a plea agreement on the charges to be preferred while the new sections 137C and 137D provides for the initiation of the process and consultations to be entered into by the prosecution.

The new section 137E is on the form in which a plea agreement and also details the contents thereof. It should, *inter alia*, be in writing. The new section 137F sets out the procedure to be followed during plea agreement while the new sections 137G and 137H provide for the competence of an accused person to enter into an agreement and the recording by the court of the factual basis of a plea.

The new section 137J is on rejection of a plea and details the consequences of such rejection while the new section 137K deals with the right of the accused person to withdraw a plea. The new section 137L makes a sentence imposed pursuant to a plea agreement final and not subject to appeal except on the extent or legality of the sentence. It also enables the Attorney-General to apply for the setting aside of a conviction and sentence on grounds of fraud or misrepresentation in the interest of the public and orderly administration of justice. The new section 137M is on protection of the plea agreement process, a vital requirement of the integrity of the process is to be safeguarded while the new section 137N exempts offences under the Sexual Offences Act, 2006, and any other offence that the Attorney-General may specify through a Gazette notice, from the ambit of the provisions dealing with plea agreements.

The amendments to section 207 (1) and (2) and section 281, introduces the aspect of plea agreement during pleading in a trial.

The enactment of this Bill will not occasion additional expenditure of public funds.

Dated the 20th June, 2007.

The Criminal Procedure Code (Amendment) Bill, 2007

S. AMOS WAKO,
Attorney-General.

Section 207 (1) and (2) of Cap. 75 which it is proposed to amend –

Accused to be
called upon to
plead.

207. (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.

(2) If the accused person admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

Section 281 of Cap. 75 which it is proposed to delete –

Procedure on plea
of “guilty”.

281. If the accused pleads “guilty” the plea shall be recorded and he may be convicted thereon.