



REPUBLIC OF KENYA



**Republic v Wanga & 2 others (Criminal Case 45 of 2019)
[2023] KEHC 27193 (KLR) (21 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27193 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE 45 OF 2019
PJO OTIENO, J
DECEMBER 21, 2023**

BETWEEN

REPUBLIC PROSECUTOR

AND

MOHAMMED WERE WANGA 1ST ACCUSED

ISMAEL ODUOR WANGA 2ND ACCUSED

JOSEPH ODHIAMBO OTIENO 3RD ACCUSED

RULING

1. While this matter was pending further evidence by the prosecution, the family of the deceased and that of the accused met and reached a settlement by a document written in Kiswahili and dated 24.2.2021.
2. In its own words the document states;

Kikao Cha Maagano Ya Kimila Kati Ya Wazee Wa Eshihaka Na Wazee Wa Lusheywa Mnamo Tarehe 24/2/2021

Wazee wa pande zote mbili, upande wa marehemu na upande wa washtakiwa baada ya kikao na majadiliano, wamekubaliana kusuluhisha kifo cha marehemu Newton Scania Omenda kimila kupitia mila ya Waluya (Wanga).

Wamekubaliana kwamba familia za washtakiwa zitatoa ng'ombe mbili na gunia la mahindi kama faini kwa ajili ya damu ya marehemu kulingana na kimila.

Familia zote mbili zimeafikiana kwamba kuwe na amani na kesi ambayo inawakabidhi washatakiwa Mohammed Were Wanga, Ismael Oduor Wanga Na Joseph Odhiambo Otieno iondolewe kotini.

Waliokuwepo: -



Kennedy Okatwa Omenda Upande Wa Marehemu

ID 133XXX61

Albert Omukubi Waswa Upande Wa Marehemu

ID 117XXX4

Wycliffe Omusula Njeremani Upande Wa Marehemu

ID 113XXX0

James Sitadi Akanga Upande Wa Marehemu

ID 966XXX8

Emmanuel Otieno Malala Upande Wa Washtakiwa

ID 245XXX19

David Ouma Wanga Upande Wa Washtakiwa

ID 258XXX59

Pius Maloba Waswa Upande Wa Washtakiwa

ID 794XX56

3. The settlement between the parties was brought to the attention of the court by counsel for the accused on the 4.10.2023. It happened that the 3rd accused had jumped bail and could not be traced and the prosecution then indicated the intention to withdraw the case against the absconder.
4. It was at that juncture that the defense counsel informed the court of the agreement and prayed that the same be made to meet the threshold of an alternative justice system traditional dispute resolution mechanism and be adopted as an order of the court.
5. It cannot be gainsaid that the Kenyans recognize that beside mainstream court system, there are alternative, channels and mechanisms of dispute resolution that must be recognized and promoted¹.
6. The judiciary is constitutionally obligated to promote alternative justice system as known and practiced by different communities. In order to meet its constitutional obligation, the judiciary has promulgated and put in place a policy to help anchor alternative justice in Kenya.
7. It is to this court an unwavering duty to promote every dispute resolution mechanism outside the court system and the only caution the court must administer to itself is the requirement that any such resolution must never contravene the bill of rights, rans affront the *constitution* or written law and the same must pass the test of not being repugnant to justice and morality or give results which are themselves repugnant to justice and morality.
8. In this matter, the only reason the prosecutor opposes the adoption of the agreement is that the office of the Director of Public Prosecution was not consulted as the exclusive controller of prosecutions. There was never any resistance mounted on article 159 (3).
9. To this court the *constitution* must be interpreted in a manner that is harmonious and promotes its purpose. While there resides exclusive control of our prosecution on the Director of prosecution, that power is a delegated power exercised on behalf of the sovereign, the people. That power cannot be exercised as to override or overshadow the wishes of the people. It equally cannot be exercised

¹ Article 159(2) d; section 26(3) High court (Organization and Administration) Act.



to overshadow or override a very essential value of the constitution that alternative justice system be promoted as a way of easing the pressure of workload upon the court system with the attendant benefit of fastening the administration of justice and broadening the right to access justice.

10. The court discerns no conflict between the right of parties to a dispute to resolved that dispute outside the court and without seeking the authority of the Director of Public Prosecution to do and the exclusive right of the Director of Public Prosecutions under the constitution.
11. In this matter, both families belong to the Wanga sub tribe of the Luhya nation and both confirm that by their customs and practices, payment for life lost is sufficient retribution to the accused and his entire family.
12. The court considers that approach to invite the benefit of creating peace and healing the wounds inflicted by the crime and reestablishes relationships.
13. The court discerns no contravention of the constitution, in general, the bill of rights in particular and any written law. The court equally identifies no aspect of the agreement as being repugnant to justice nor morality.
14. The agreement thus passes the test as an effective alternative justice resolution and the court adopts it as an order of the court.
15. The consequence is that in the terms of the agreement, the case against the accused persons is terminated and they are discharged.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 21ST DAY OF DECEMBER, 2023

PATRICK J O OTIENO

JUDGE

