

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HIGH COURT CRIMINAL CASE NO. 20 OF 2016

REPUBLIC.....STATE

VERSUS

MUTATI MWENDE.....DEFENDANT

RULING

1. Can the family members of a person accused of murdering a member of the family gang up and say that they have resolved to forgive the culprit and on that basis ask the trial court through the Office of Director of Public Prosecution to terminate the murder trial? This is the question that this court has had to grapple with in an attempt to dispense justice.

2. In this matter, **Muteti Mwende**, the accused herein, is charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars are that on **10th July 2016**, at **Ikene sub-location, Kavaani Location** of **Kyuso Sub-County**, within **Kitui County** he murdered **Wambua Musyimi** who was a brother to him.

3. The Accused Person upon being arraigned denied committing the offence and the Prosecution has called a total of seven witnesses. This court on **22nd September, 2020** was informed by the prosecution that only 3 witnesses remained, the Investigation Officer, a Government Chemist and the doctor who performed post mortem examination on the body of the deceased. When the matter came up for further hearing on **11th February, 2021**, the prosecution through Mr. Okemwa learned Counsel for Office of the Director of Public Prosecution informed this court that he had been placed in a difficult position by the family members who were desirous of forgiving the accused person. It is on that basis, that Mr. Okemwa a *nolle prosequi* dated **11th February 2021**.

4. This court upon the application by the Director of Public Prosecution to enter *nolle prosequi* directed for a social inquiry report because I wanted to get the reactions or position of all the family members including the wife of the deceased.

The social inquiry revealed that indeed the mother of the accused and other relatives had forgiven the accused. However, the wife of the deceased could not be reached as she is said to have left her matrimonial home soon after her husband was murdered. Her position regarding this trial and the forgiveness of the accused person remains unknown.

5. This court has considered the fact that the majority of, if not all the eye witnesses who happen to be the same family members exerting pressure on the Director on Public Prosecution to terminate the proceedings have testified. As a matter of fact, the remaining witnesses are formal witnesses who have nothing to do with the impugned family agreement to “*forgive*” the accused person. I have termed the agreement impugned because the accused person has not owned up to the crime he committed and at least show some remorse or ask for forgiveness from the deceased family.

6. The power to discontinue any criminal proceedings in my view has to be used in a rational and objective manner having regard to public interest and interests of the administration of justice to avoid situation where the said powers are used in a manner to abuse court process and let culprits who would otherwise be made to account for their crime go scot free on account of “*forgiveness*” by family members.

7. This court takes the view that in serious cases such as murder or any other case of capital nature, the State through the Director of Public Prosecution, should exercise their mandate to terminate proceedings very sparingly and instead resort to plea bargain as provided for under **Section 137 A** of the **Criminal Procedure Code**. That way, the trial court would be able to determine a suitable sentence depending on the remorsefulness, seriousness of the offence, and the period the accused has spent in custody among other factors.

8. It is for the above reasons why the Constitution under **Article 157(8)** and **Section 25(1)** of **Office of Director of Public Prosecution Act, 2013** subjects the exercise of power to terminate criminal proceedings to the permission of the court. The permission of the court is given only if the termination of the proceedings is done in good faith, is objective rational and done in Public interest and the wider interest of administration of Justice.

In my considered view, an agreement reached between families of an accused person and deceased or among family members where the deceased and accused are from the same family should not be the sole basis of *nolle prosequi*.

9. In situations such as in the instant case, where evidence tendered, tendered points to a conflict, or disagreement over land it would be a travesty of justice to allow a person to kill his brother in order to get his land and because of “*forgiveness*” by other family members he is left to go scot-free, to go and take over the land they were fighting for with the deceased. To give room to such, may lead to undesired anarchy and the rule of the jungle where survival for the fittest rules apply. In a modern open democratic society that cherishes the rule of law, there is no room for that.

This court being guided by the national values and principles of governance under **Article 10 of the Constitution of Kenya 2010** and the

right of life under **Article 26** finds that the application by the prosecution to enter a *nolle prosequi* at this stage is not merited and undesirable. It is against the interests of justice and the same is disallowed. The prosecution and the defence are at liberty as I have observed above to enter into a plea bargain if the accused is ready to plead to a lesser charge.

Otherwise for now, I direct that this matter does proceed to its logical end.

DATED, SIGNED AND DELIVERED AT KITUI THIS 18TH DAY OF MARCH, 2021.

HON. JUSTICE R. K. LIMO

JUDGE