



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL CASE NO.20 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

RICHARD MELI.....ACCUSED

RULING

1. The Accused Person in this case **RICHARD MELI** was charged with Murder Contrary to Section 203 as read with Section 204 of the Penal Code CAP 63 Laws of Kenya.
2. The particulars of the charge were that on 16/10/2015 at Simbi Village in Kericho District, Kericho County, the Accused Person jointly with others not before Court Murdered **ERICK KIPRONOLANGAT**.
3. The witnesses did not appear in Court to testify and on 12/4/2021, the Prosecuting Counsel applied under Section 25 of the Office of the Director of Public Prosecutions Act No. 3 of 2013 (ODPP Act) and Article 157, Sub Articles (6) (c), (7) and (8) of the Constitution of Kenya, 2010 seeking the permission of the Court to terminate criminal proceedings against the Accused Person and to withdraw the case under Section 87 (a) of the Criminal Procedure Code CAP 75 Laws of Kenya.
4. The Defence Counsel urged the Court to discharge the Accused Person under Section 210 of the Criminal Procedure Code CAP 75 Laws of Kenya since there was no evidence against the Accused Person.
5. The ODPP has powers to terminate criminal proceedings vested in **Article 157, Sub Articles (6) (c), (7) and (8)** of the Constitution of Kenya, 2010 and **Section 25** of the Office of the Director of Public Prosecutions Act No. 3 of 2013 (ODPP Act). However, the ODPP is required to obtain Court's permission before discontinuing prosecution subject to **Article 157 (8)** of the Constitution of Kenya, 2010. When exercising such power the ODPP is required to give due regard to public interest, interests of the administration of justice and the need to prevent and avoid abuse of legal process subject to **Article 157 (11)** of the Constitution of Kenya, 2010.
6. The ODPP are also empowered to enter a *nolle prosequi* orally or in writing in any criminal case and at any stage thereof before verdict or judgment subject to **Section 82** of the Criminal Procedure Code CAP 75 Laws of Kenya. An application of *nolle prosequi* shall terminate criminal proceedings and the accused person shall be discharged or released if in custody, however, the discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts. However, **Article 157 (7)** Constitution of Kenya, 2010 states that if the proceedings are discontinued after close of the prosecution's case the accused person must be acquitted. The legal consequence of an application for *nolle prosequi* shall result in either a withdrawal or an acquittal depending on the stage of the trial at which the application is entered by the prosecution counsel.
7. **Section 87** of the Criminal Procedure Code CAP 75 Laws of Kenya does not apply to this case. It states as follows:- ***"In a trial before a subordinate court a Public Prosecutor may, with the consent of the court or on the instructions of the Attorney General at any time before judgment is pronounced, withdrawal from the prosecution of any person, and upon withdrawal (a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on the accounts of the same facts; (b) if it is made after the accused person is called upon to make his defence, he shall be acquitted."***
8. It is clear from the above that section 87 of the Criminal Procedure Code CAP 75 Laws of Kenya only applies to proceedings in subordinate courts. It does not apply to proceedings in the High Court. The prosecuting counsel cannot therefore rely on that section in these criminal proceedings.
9. This case has never proceeded since 2015 and it is in the interest of justice that the prosecution terminates the case in view of the fact that the witnesses are not available.

10. The Defence Counsel urged the Court to discharge the Accused Person under Section 210 of the Criminal Procedure Code CAP 75 Laws of Kenya. However, the prosecution has not adduced any evidence for consideration by the Court.

11. In **REPUBLIC -VS- MUNEH WANJIKU IKUGU [2016] eKLR** the prosecution had conducted the trial for four years and ten months during which the accused was in custody. The prosecution had been unable to trace witnesses and sought to withdraw the case. In this case the prosecution had two avenues to terminate criminal proceedings to enter a *nolle prosequi* (withdrawal) or to elect not to call for further evidence and close its case (acquittal). The prosecution elected the latter. The legal consequence of the *nolle prosequi* was hinged on whether or not the prosecution closed its case, failure to which the prosecution could bring the charges afresh. The Court found that there was no reasonable likelihood that the witnesses would be traced and that the prosecution would present any evidence in the case which could lead reasonably lead to a conviction. The Court proceeded to acquit the accused under section 210 of the Criminal Procedure Code CAP 75 Laws of Kenya.

12. In **REPUBLIC -VS- ABDIRASHID HUKOW GULIE [2015] eKLR** the Court granted permission to the ODPP for discontinuance of the criminal proceedings under section 25 (1) ODPP Act No. 3 of 2013 and declined to neither discharge the accused under section 87 (1) of the Criminal Procedure Code CAP 75 Laws of Kenya which applies to subordinate courts, nor acquit under section 202 of the Criminal Procedure Code CAP 75 Laws of Kenya, as the court was not moved under any of those sections.

13. In **REPUBLIC -VS- ABDIRASHID HUKOW GULIE [2015] eKLR** Dulu J. stated that "*as per the provisions of section 25 of the ODPP Act, the only jurisdiction of the court is either to give permission or deny such permission. The court, in my view has no further function after granting permission to the Director to discontinue criminal proceedings. It cannot go further to determine whether the accused is acquitted or discharged.*"

14. Having considered the relevant provisions of the law and several cases, this court grants permission to the Director to discontinue the prosecution herein as requested.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 30TH DAY OF APRIL, 2021.

A. N. ONGERI

JUDGE