



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL CASE NO. 12 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**AHMED SHEIKH ISAACK.....1<sup>ST</sup> ACCUSED**

**MOHAMED HUSSEN ADAN.....2<sup>ND</sup> ACCUSED**

**RULING**

The two accused persons were charged in this court on the 25th August 2016 with murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap 63) Laws of Kenya. The particulars of the offence were that on 3<sup>rd</sup> August, 2016 at Burka Bertha forest in Lafey sub-county within Mandera County jointly murdered Hodhan Billow Hussein.

They were brought to court and on 8<sup>th</sup> September, 2016 and pleaded not guilty to the charge. Hearing was then set for 20<sup>th</sup> December 2016.

On that 20<sup>th</sup> December, 2016 the prosecution asked for adjournment which was granted. The case was then fixed for hearing for two days 30<sup>th</sup> and 31<sup>st</sup> May 2017. On that day, also the Prosecuting Counsel Mr. Okemwa informed the court that he did not have witnesses and that he had received a letter from the DCI in Lafey sub-county informing him that witnesses were not available. The matter was then put for mention on 11<sup>th</sup> July to await a comprehensive report from the police.

On the 11th of July, 2017 Mr. Okemwa asked for a further adjournment to get formal communication from the police and stated that, at that time most police officers were engaged in the national election related matters. The matter was then put for mention on 27th July 2017 when Mr. Okemwa informed the court that he had received a letter from the police, a copy of which he had submitted to the court, on availability of witnesses. The case was again put for mention on 4<sup>th</sup> October, 2017 to allow time for the prosecution to make up their mind what to do.

The case was then mentioned on 15<sup>th</sup> November 2017 on which date Mr. Okemwa informed the court that the prosecution intended to apply for permission to withdraw the case. As Mr. Nyasani for the defence was absent from court, the matter was put for mention on 16<sup>th</sup> November, 2017 when Mr. Okemwa informed the court that he was convinced that it was not possible for the prosecution to avail witnesses in this murder case. According to Prosecuting Counsel, the incident subject of the charge occurred near the volatile Kenya-Somali border where even police officers were currently not able to operate from their police station. The witnesses were also pastoralists who had closed over to Somalia and could not be traced. The prosecuting counsel stated further that he had information that the local

community had amicably settled the matter through “maslah”.

Prosecuting Counsel submitted therefore, that in order to avoid a situation where the two accused persons would be held in custody indefinitely, the Director of Public Prosecutions was making an application for permission of the court to discontinue the case under Section 25 (1) of the Office of Director of Public Prosecution Act, as the prosecution was not able to avail witnesses in court.

In response, Mr. Nyasani counsel for the accused person stated that he had no objection to the request, and in fact that this application should be made earlier.

I have considered the request by the Director of Public Prosecutions.

Under Article 157 (6), (7) and (8) of the Constitution of Kenya 2010, the Director of Public Prosecutions may discontinue any criminal proceedings before judgment is delivered. Such discontinuance however is subject to the permission of the court.

Section 25 of the Office of the Director of Public Prosecutions Act 2012 implements the above Constitutional provisions through an Act of Parliament.

The Director of Public Prosecutions has in the present case explained to this court the reasons for seeking this court’s permission to discontinue the criminal proceedings. The reasons range from insecurity in Mandera area where the incident occurred and the relocation of crucial witnesses to Somalia, to settlement of the dispute through clan discussions.

The availability of witnesses is crucial and without witnesses the case cannot proceed. If it proceeds without key witnesses being availed especially those who were on the site of incident and possessed primary evidence, then the case will fail and the accused persons acquitted for lack of evidence. In the present case, the request for discontinuance of the criminal proceedings will not lead to an acquittal as the prosecution has not closed their case.

From the facts presented before me therefore, I find that the Director of Public Prosecution (DPP) has good reason to ask for permission for the withdraw of the criminal proceedings at this time taking into account that the two accused persons have been in custody since August 2016 and the DPP is not able at the moment to avail witnesses. I thus allow the request for discontinuance of the criminal proceedings herein which I hereby discontinue.

As no witness has yet testified, each of the two accused persons herein is hereby discharged. If the prosecution at any time has witnesses available they may prosecute the accused persons for the same offence and on the same facts.

**Dated and delivered at Garissa on 23<sup>rd</sup> November, 2017.**

**GEORGE DULU**

**JUDGE**