



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO 90 OF 2013**

**LESIT, J.**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**ABDULAHI NOOR MOHAMED (ALIAS ARAB).....ACCUSED**

**RULING**

1. The accused, **Abdullahi Noor Mohamed alias Arab** is charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars of the charge are that:

***On the 24<sup>th</sup> day of June 2013 along Jam Street, Eastleigh Estate, Kamukunji district within Nairobi County murdered Abdifatah Sharif Mohamed.***

2. By way of a Chamber Summons dated 25<sup>th</sup> April 2016, the accused seeks to have the court grant him and the deceased family time to reconcile and settle the matter out of court. The application is supported by the Affidavit of the accused person sworn on 25<sup>th</sup> April, 2016.

3. The accused Advocate filed a further affidavit sworn by the accused person on 21<sup>st</sup> June, 2016 where he deposed that the two families had a pre- signed agreement and wished to have the same allowed and confirmed by the court.

4. In arguing the application, Ms. Nyang, counsel for the accused urged that the accused was seeking a plea bargain under **Articles 48, 49, 50 and 51** of the **Constitution**. Counsel took cognizance of the fact that the matter was pending judgement at the time of filing this application. She however, urged that notwithstanding the pending judgement, the parties were negotiating and seeking an out of court settlement in accordance with the Somali culture, law and religion.

5. Counsel further urged that a pre-signed agreement had been filed, and that the complainants were some of the signatories to the said agreement who witnessed the agreement.

6. She submitted that the families having signed the agreement had reconciled their minds and felt that the agreement ensured justice for them and the community.

7. Ms. Nyang urged that the accused person's mind was settled that the terms of the agreement would be allowed and that they would ensure justice is met by all the parties regardless of the outcome of the judgment. She urged that the deceased was the accused's friend and having been in custody for 3 years, the accused had learnt his lesson and was remorseful for the offence.

8. Ms. Nyang further submitted that though such crimes must be discouraged and though much time had been spent by the court in meeting the ends of justice, the two families had reconciled and were ready and willing to forgive each other and move on. She urged that the accused was a young man and if given time, he can change his life and move in a different direction. She also urged that he was an orphan with two sisters who were ready to stand as sureties.

9. Counsel urged that the application was a normal one although it had made late in the day.

10. Ms. Onunga, counsel for the state opposed the application and urged that **section 3(2)** of the **Judicature Act** should only apply if it was not repugnant to written law. She stated that the law was clear on how murder cases should be handled and that was the reason the said case was before the court. Counsel urged that a life was lost and that no amount of reconciliation would bring back that life.

11. Ms. Onunga submitted that under **Article 26** of the **Constitution**, the right to life of the deceased person needed to be balanced with that of the accused person. While acknowledging the good gesture and efforts of the two families to reconcile, counsel emphasized that all criminal cases are instituted and prosecuted in the name of the state and not that of the family and the court therefore, needed to proceed with the case to its logical conclusion.

12. In reply, Ms. Nyang submitted that the negotiation is not only traditional but human and grounded on the law of natural justice and the new Constitution. She submitted that the request made by accused was not repugnant to any written law and further that it was right to have the rights of both the accused and deceased considered.

13. I have considered the submissions of counsel for the accused and the State.

14. Counsel for the accused was seeking for a plea bargain under **Articles 48, 49, 50** and **51**. The said provisions however, deal with access to justice, the rights of arrested persons, fair hearing and rights of persons detained, held in custody or imprisoned respectively. Plea bargain is however, provided for under **section 137A** through to **section 137O** of the **Criminal Procedure Code**. However, I will not belabor that point.

15. Alternative forms of dispute resolution including reconciliation are recognized under **Article 159 (2) (c)** of the **Constitution** which provides that:

**‘In exercising judicial authority, the courts and tribunals shall be guided by the following principles—**

***(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)***

16. **Clause (3)** of the same article states:

***‘Traditional dispute resolution mechanisms shall not be used in a way that:***

***(a) Contravenes the Bill of Rights;***

***(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or***

***(c) is inconsistent with this Constitution or any written law.***

17. The **Judicature Act** in **section 3(2)** equally stipulates when the customary law is to be applicable. It states that:

***‘The High Court, the Court of Appeal and all subordinate courts shall be guided by African***

*customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.'*

18. The **Criminal Procedure Code** under section 176 provides:

*'In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.'*

19. From the reading of the aforementioned statutory provisions, it is quite evident that application of alternative dispute resolution mechanisms in criminal proceedings was intended to be a very limited. The **Judicature Act** in fact only envisages the use of the African customary law in dispute resolution only in civil cases that affect one or more of the parties that is subject to the particular customary law. It is also evident that even where the alternative dispute resolution mechanisms are to be used in the criminal matters, it is limited to misdemeanors and not on felonies.

20. The accused herein has been charged with the offence of murder, which has been classified as a felony and therefore, among the crimes that **section 176** of the **Criminal Procedure Code** prohibits the courts from adopting reconciliation as a form of justice. In the case of **Juma Faraji Serenge alias Juma Hamisi v Republic [2007] eKLR**, Maraga, J. (as he then was) in his ruling stated:

*'To the best of my knowledge, other than in cases of minor assault in which a court can promote reconciliation under section 176.... of the Criminal Procedure Code and such minor cases a complainant is not allowed to withdraw a criminal case for whatsoever reason. In any case the real complainant in all criminal cases, and especially so felonies, is the state. The victims of such crimes are nominal complainants. And the state, as the complainant, cannot be allowed to withdraw any such case because the victim has forgiven the accused as happened in this case or any such other reason. The state can only be allowed to withdraw a criminal case under section 87A of the Criminal procedure Code or enter a nolle prosequi when it has no evidence against the accused or on some ground of public interest. And even then when it has convinced the court that the case should be so withdrawn''.*

*To allow withdrawals of criminal cases like this is tantamount to saying that relatives of murdered persons can be allowed to withdraw murder charges against accused persons whom they have forgiven. That cannot be allowed in our judicial system.'*

21. This is applicable in the instant case where the deceased family are seeking to withdraw from the case on account of the signed agreement of reconciliation, which should not be allowed unless the prosecution is involved. As was the case in **Republic v Mohamed Abdow Mohamed High Court Criminal Case No. 86 of 2011 [2013] eKLR**, where the accused was facing murder charges. The families of the accused and the deceased had reached a settlement after some compensation was made and rituals conducted. The family of the deceased informed the prosecution by a letter that they did not wish to pursue the matter. The prosecution made an oral application to have the matter marked as settled citing **Article 159** of the **Constitution** and the Affidavit of the deceased's father. This was the proper course to take, involving the prosecution. The court proceeded to allow the application for withdrawal, citing the powers of the Director of Public Prosecutions to discontinue proceedings. However, I am not in agreement with the manner in which the matter was determined by the court. In my view, the parties ought to have reduced the settlement into a plea agreement and presented to the court.

22. The constitutional recognition of alternative justice systems as one of the principles to guide courts in the exercise of judicial authority does not exclude criminal cases. This recognition restated the place of alternative justice systems in the administration of justice. **Article 11** recognises culture as **'the**

***foundation of the nation and as the cumulative civilization of the Kenyan people and nation***'. There are however, no policy guidelines on how to incorporate the alternative justice systems in handling criminal matters. As noted above, statutory provisions only limit to certain category of offences, and this does not extend to capital offences. There is also no formalized structure on how informal justice systems can be applied to handle criminal matters and their scope of operation. Policy engagement is paramount to provide guiding principles on such as aspects as the types of cases that can be determined through the alternative justice systems, interrelation of such application (if any) with the court process, how and when the alternative process is to be invoked in the course of proceedings among others.

23. Owing to the seriousness of some offences such as in the instant case, some direction is needed; more so, to ensure that there is consonance with the constitutional principles, and the requirements set out under **Article 159(3)** on the application of tradition dispute resolution. Some efforts are underway with the appointment of the Task Force on Traditional, Informal and Other Mechanisms used to Access Justice in Kenya (Alternative Justice Systems) in line with the Judiciary's plan to develop a policy to mainstream alternative justice system with a view to enhancing access to and expeditious delivery of justice.

24. The agreement being relied on by parties is said to have been reached between the accused and the family of the deceased. However, the prosecution was not involved in the process, and bypassing this function would be departing from the very essence of public prosecutions.

25. Furthermore, the **Criminal Procedure Code** anticipates that plea agreements involve both the prosecution and the accused person. **Section 2** defines a plea agreement as ***'an agreement entered into between the prosecution and an accused person in a criminal trial in accordance with Part IV.'*** The **Criminal Procedure Code** prescribes how a plea agreement is entered into and enforced. The process involves both the prosecution and the accused person; while taking into account of factors as the interests of the victims of the crime. This creates a distinction from civil cases where parties can freely negotiate and present their agreement in court for enforcement.

26. The prosecution has also opposed the application, and has from the onset been unwilling to pursue a plea agreement with the accused. It is well within the constitutional powers of the Director of Public Prosecutions to undertake criminal proceedings, and he enjoys autonomy in exercise of this function.

27. A crime is an injury not only against the affected individual(s) but also against the society. Offences are prosecuted by the state, which in so doing protects the social rights of all citizens. Therefore, at a minimum, the prosecution should be consulted before having the reconciliation agreements and customary laws applied in resolving criminal cases. In this case, the prosecution turned down any an offer by the accused to negotiate a plea agreement proposal. By asking this court to enforce an arrangement between the accused and the family of the accused, to the exclusion of the prosecution amounts to a disregard of the law on the exercise of prosecutorial powers. That cannot be the object envisioned under **Article 159** when recognizing alternative justice systems as one of the principles to be promoted by courts when exercising judicial authority. Application of alternative dispute resolution mechanisms must be consistent with the Constitution and the written law of the land.

28. The Director of Public Prosecutions is the custodian of prosecutorial powers. Prosecution of offences is a public policy concern, and in preserving this power to preserve the public interest, he cannot be by passed in negotiations concerning charges against an accused person. As it was stated in the case of **Gregory & Another v Republic thro' Nottingham & 2 Others [2004] 1KLR 547:**

***'The process of the criminal law is a vital aspect of the administration of justice, and is one of the key spheres of public policy and public interest, in the overall conduct of national governance. In this domain of the public interest, we believe, the dictates of public order would require that the Attorney – General should function as the primary decision – maker, of course, subject to the legislative directions of the Parliament and the oversight of the High Court.***

***...the conduct of criminal prosecutions is always a matter of public interest. Therefore, the Attorney-General who is responsible for the conduct of public prosecution in the name of the***

***Republic, is under a duty to safeguard the public interest as he manages the prosecutorial process. It is equally clear from the submissions of counsel, and from the authorities referred to, that the private individual is not in general to be regarded as the custodian of the public interest.'***

Following the promulgation of the **Constitution, 2010**, this power lies with the Director of Public Prosecutions.

29. The Constitution and the written laws recognize alternative dispute resolution and traditional dispute resolution mechanisms as means of enhancing justice. The court does appreciate the good will of the accused family and that of the deceased in their quest to have the matter settled out of court. The charge against the accused is a felony and as such reconciliation as a form of settling the proceedings is prohibited. Furthermore, this request is being made too late in the day, when the case has been heard to its conclusion. For these reasons I find that the application lacks merit. The application is therefore disallowed.

**READ, DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY, 2016.**

**LESITT, J.**

**JUDGE.**