

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 36 OF 2012

REPUBLIC APPLICANT

V E R S U S

DENU LALLAFA OMAR ACCUSED

RULING

The accused herein stands charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence are that on 5th November 2012 at Koticha village Tana River District within Tana River County murdered Daud Duko Galole. He has denied the charge. The case has not commenced hearing so far.

On the 17th August 2016, the learned Prosecuting Counsel Mr. Okemwa informed this court that the father of the deceased Said Shora and the father of the accused who were brothers had discussed with Orma elders and conducted “maslaha” – traditional amicable settlement. Counsel submitted that under the Constitution, Article 159(1)(c), alternative dispute resolution mechanisms had been allowed. Counsel submitted that the Director of Public Prosecutions had been trying to come up with guidelines on alternative dispute resolutions in the criminal process, but had not so far finalized the exercise. However in this region the “maslaha” method of dispute resolution had been in practice for a long time. In our present case, since 2013 the prosecution had been unable to get witnesses attend court as the view of the local community were that there was no point of losing two people, and relied on a ruling in Nairobi ***Criminal case No. 86 of 2011 Republic -vs- Mohamed Adow Hassan*** on discontinuance of criminal proceedings.

Counsel thus said that the Director of Public Prosecutions (DPP) was requesting the court under Article 157 of the Constitution and section 25 of the Office of the Director of Public Prosecution Act 2012, for grant permission by the court for discontinuance of the criminal proceedings herein.

Mr. Nyasani learned counsel for the accused, appreciated the good gesture of the prosecution and added that the prosecution should have taken such a step long time ago.

I have considered the request by the DPP for discontinuance of the criminal proceedings herein.

The learned prosecutor has stated that they are not able to get witnesses because “maslaha” had already taken place within the Orma Community, where the deceased and the accused come from. I have seen the resolutions on the matter witnessed by the Chief Wayu Location Tana River County. The resolutions state as follows:-

“On the 3rd December 2012, family of the accused approached the Orma Council of elders in the presence of the Wayu Location Chief and explained at length how they have resolved and abandoned the accused who is a younger brother of the deceased, they said the incident was by bad luck and the killing was not intentional. However, the family also resolved to pay the deceased children 20 herds of cattle which will be paid by the family, relatives and the entire Karara clan, which the family belongs to. Sir, for your good information and record purpose in addition to the above family members who include Mr. Haji Ali Jarso Shora of ID No.xxxxxxxx, Mr. Said Galole Shora of Id No. xxxxxxxx all being the parents of the accused and the deceased state in their own words that they will take care of the deceased families, children ie for their

education, medical care and other necessities as and upto when they take up their responsibilities.”

It is apparent from the above resolution that the clan and the father of the deceased and the father of the accused have agreed that compensation be paid to amicably settle the matter in which the deceased met his death. Though the offence charged is a serious offence of murder, in light of the above agreement I find no alternative available to this court other than accepting the request of the prosecution for discontinuance of the case, as the prosecution has not been able to bring a single witness to court since 2012.

Discontinuance of the criminal case at this stage does not amount to an acquittal. It result in a discharge as the prosecution has not closed its case. Therefore the accused may be charged anytime hereafter with the same offence, if there is good justification to do so.

In the circumstances of this case, I allow the request of the Director of Public Prosecution (DPP) and grant permission for withdrawal of the criminal proceedings herein. In effect the criminal proceedings herein are hereby withdrawn and the accused person is hereby discharged.

Dated and delivered at Garissa this 12th October 2016.

GEORGE DULU

JUDGE