



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 20 OF 2014**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ADOW ISSACK KULLOW.....ACCUSED**

**RULING**

The accused Adow Issack Kullow was brought to this court on 13<sup>th</sup> October 2014 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 4<sup>th</sup> October 2014 at Bulla Dana in Rhamu Township Rhamu SubCounty within Mandera County murdered one Jimalle Muhammed. He pleaded not guilty to the charge.

The case was thereafter mentioned on a number of occasions, and has not commenced hearing todate. The case has been fixed for hearing a number of occasions but has not been heard, and learned Prosecuting Counsel indicated to the court that he was finding it difficult to get witnesses.

On the 14<sup>th</sup> of September 2016, learned Prosecuting Counsel Mr. Okemwa informed the court that though the matter had previously been fixed to hearing a number of times, the prosecution had failed to proceed with the matter because the police were not able to trace witnesses as the said witnesses were unwilling to come to court, as compensation had already been paid to the family of the victim. Counsel relied on a letter dated 29<sup>th</sup> February 2016 from the police at Mandera as evidence of such frustrations. Counsel also relied on minutes of meetings in which, compensation of 1million shillings was agreed between the Degodia and Garre clans of the Somali community which was attended by the County Commissioner of Mandera Mr. Kuria, as well as the Chief Officer of the National Cohesion and Integration Commission.

Counsel submitted therefore that in view of the above, it was his opinion that Article 159 of the Constitution of Kenya which required courts to embrace alternative methods of dispensing justice including reconciliation, should be applied in the present case. As such counsel argued that there is no other sensible way for the exercise of the powers of the Director of Public Prosecutions under Article 157 of the Constitution, than asking for withdrawal of the case under section 25 (1) of the Office of the Director of Public Prosecutions Act of 2012. Counsel thus urged this court to grant permission for discontinuance of the case. Counsel relied on a case of ***Republic Vs. Mohamed Adow Mohamed Nairobi High Court Criminal Case No. 86 of 2011.***

Mr. Nyasani learned counsel for the defence, submitted that the prosecution had taken unduly long to ask for the withdrawal of the case. Counsel appreciated however what the prosecuting counsel had said and stated that the defence did not object to the request of the prosecuting counsel for discontinuance of the case.

I have considered the matter. I have perused the letter dated 27<sup>th</sup> June 2016 addressed to the Office of the Director of Public Prosecutions at Garissa and signed by Samuel Sakwa an inspector of police, for the DCIO Mandera North. In that letter it was stated that two clans of the accused and the deceased had reached a compromise in the matter. The Garre clan had agreed to pay the Degodia clan 1 million shillings as compensation. They also agreed that a person who was injured in the fight from the Degodia clan be paid 40,000/= and his medical bills be paid by the Garre clan. The said letter attached minutes of the two clans of meetings held in October 2014 which evidenced the said agreements. I have also perused

the said minutes.

I appreciate that the charge brought against the accused person is a serious charge of murder. However, as the prosecuting counsel has correctly pointed out, this court cannot force witnesses to come and testify. Admittedly, it is the responsibility and duty of witnesses to assist the court and tender evidence for justice to be done. In the present case however, the witnesses are not available because the two clans Garre and Degodia have amicably settled the dispute through payment of compensation to the Degodia clan.

In my view therefore and in the circumstances of this particular case, this court may invoke the provisions of Article 159 of the Constitution and promote alternative justice system, through the reconciliation which has already been conducted.

Allowing the withdrawal of this case, as requested by the Prosecuting Counsel at this stage, does not in any case result in an acquittal of the accused, as he can still be charged for the same facts and same offence.

I thus allow the request of the Director of Public Prosecutions and grant permission for the criminal proceedings herein to be discontinued. As such the criminal proceedings herein are hereby discontinued under section 25 of the Office of the Director of Public Prosecutions Act, and the accused is thus discharged.

**Dated and delivered at Garissa this 12<sup>th</sup> day of October 2016**

**GEORGE DULU**

**JUDGE**