



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

**AT NAIROBI**

**HIGH COURT CRIMINAL CASE NO 2 OF 2006**

**REPUBLIC** .....

**.....PROSECUTOR**  
**-VERSUS-**

**DAMIANO JOSIAH NYANYA**.....

**.....ACCUSED**

**R U L I N G**

The accused, ***Damiano Josiah Nyanya***, (hereinafter referred to as the accused) is charged with the offence of murder contrary to section 203 as read together with section 204 of the Penal Code.

The particulars of the charge are that on the night of 25<sup>th</sup> September, 2005 at Dandora Estate Phase 4 within Nairobi Province, murdered Cynthia Oundu Dundo (hereinafter referred to as the deceased).

Plea was taken on 9<sup>th</sup> January, 2006 before Angawa J. Hearing commenced on 7<sup>th</sup> June 2007 before Apondi J. who by 28<sup>th</sup> February 2008 had heard 5 prosecution witnesses.

On 28<sup>th</sup> February, 2008 Mr. Okach for the accused raised the issue of violation of the Constitutional rights of the accused courtesy of section 72(3) of the old Constitution.

Apondi J. delivered a ruling on that point on 15<sup>th</sup> April, 2008 dismissing the said Constitutional application. The said Judge ordered the hearing to proceed to its logical conclusion.

Aggrieved by the dismissal order aforesaid M/S Ondieki & Ondieki Advocates filed a Notice of Appeal to the Court of Appeal on 23<sup>rd</sup> April, 2008 challenging the order of dismissal aforesaid. It suffices to say that the Court of Appeal dismissed the said appeal.

On 14<sup>th</sup> May, 2010 Mr. Ondieki Advocate intimated to the Court that in view of the Court of appeal ruling the hearing should proceed from where it had reached. Mrs. Tuta for the prosecution then intimated to the Court that the prosecution would call only 2 more witnesses. Hearing was then re-scheduled for 9<sup>th</sup> July 2010 at 9.00a.m.

On 9<sup>th</sup> July 2010 the trial Court was not sitting. The matter was then adjourned to 24<sup>th</sup> September, 2010.

On 29<sup>th</sup> September, 2010 Mrs Ogoma for the Republic sought an adjournment on the grounds that she did not have witnesses. The Court then adjourned the trial and re-scheduled the hearing to 12<sup>th</sup> November.

On 12<sup>th</sup> November, 2010 the case was stood over to 17<sup>th</sup> November 2010 for mention before Apondi J. Ms. Opakasi Advocate on behalf of Mr. Njanja applied for the recall of all the 5 witnesses that had given evidence earlier on.

On 19<sup>th</sup> November, 2010, Mr. Njanja for the accused re-newed his application to recall the 5 witnesses which had earlier on given evidence. The prosecution did not resist the application. Apondi J. then ordered that the matter to commence **de-novo**. The said Judge further ordered that the matter be mentioned before the Presiding Judge on 23<sup>rd</sup> November, 2010 with a view to fixing a fresh hearing date.

On 23<sup>rd</sup> November, 2010 I fixed the case for hearing on 9<sup>th</sup> and 10<sup>th</sup> February, 2011.

On 9<sup>th</sup> February, 2011, the defence counsel intended to argue a preliminary objection pursuant to his notice dated 7<sup>th</sup> February, 2011. The notice aforesaid was couched in the following terms.

***“ That the accused was arrested on 8<sup>th</sup> October 2005 and kept in Police Custody without any charges preferred on him for a period beyond the 14 days as by then required by law before he was charged in Court on 9<sup>th</sup> January 2006.”***

At the end of the day the said advocate withdrew the said notice. The matter was re-scheduled for mention for 14<sup>th</sup> February, 2011. On that day the trial was adjourned to 25<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup> and 28<sup>th</sup> April 2011.

On 7<sup>th</sup> April, 2011 the matter was mentioned before me on realization that the hearing dates aforesaid fell during the Easter vacation. The case was then re-scheduled for mention on 11<sup>th</sup> April, 2011 with a view to fixing an early hearing date.

On 11<sup>th</sup> April, 2011 the prosecution and the defence agreed by consent to have the matter heard on 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup> and 23<sup>rd</sup> June, 2011.

On 20<sup>th</sup> June, 2011, Mrs Ogoma, for the state intimated to Court that the prosecution was not ready to proceed for lack of witnesses and exhibits. She requested that the prosecution be given time up to 23<sup>rd</sup> June, 2011 to avail the witnesses and exhibits so that the hearing could proceed on Thursday the 23<sup>rd</sup> of June, 2011. The defence conceded the application. I ordered that the hearing do commence on 23<sup>rd</sup> June, 2011.

On 23<sup>rd</sup> June Ms Ngetich came in place of Ms Ogome. She informed the Court that the witnesses and exhibits were unavailable. After heated arguments on both sides, I adjourned the case for hearing on 29<sup>th</sup> July, 2011.

On 29<sup>th</sup> July, 2011 Ms Ngetich once again requested for time to avail the exhibits to facilitate the hearing. She informed the Court that two prosecution witnesses from Budalangi were in Court but the case could not proceed for lack of exhibits. I adjourned the trial to 30<sup>th</sup> July, 2011 when Ms Ngetich for the prosecution intimated to the Court that the OCS Dandora Police Station, who was in Court, informed her that the handing over of the exhibits hit a snag. Most of the police officers who had handled the file had been transferred not to mention that the initial investigating officer committed suicide. The defence counsel, Mr. Njanja, strenuously resisted the adjournment application. I then asked Ms Ngetich to come back at 12.00 noon to intimate to Court whether the state intended to enter a **nolle-prosqui**, or withdraw the charge.

Ms Ngetich did not appear at 12.00 noon. The later turned up at her until 12.50 pm. At 12.50 the file was called out once again and Mr. Njanja for the defence addressed the Court as follows:

***“We submit that the case has been adjourned severally by the state counsel on grounds that they have been looking for the exhibits and the witnesses. The OCS of Dandora Police Station came to Court today but he had no exhibits”.***

***I pray that since there is no evidence presented before this Court, this Court should proceed and acquit the accused under section 306(i) as read together with section 216 of the Criminal Procedure Code”.***

I then reserved my ruling which I now give.

I have endeavoured to show the chequered history of this case so that whoever reads the ruling should understand where I am coming from.

There is one golden principle in the administration of justice which is of utmost importance and that is: There must be an end to litigation.

The charge was registered on the 19<sup>th</sup> day of December, 2005.

From the commencement of the trial this case has failed to take off for one reason or another. Most importantly the original investigation officer committed suicide in the course of the trial. Then several police officers who have handled the file have been transferred from time to time. During this long duration the exhibits also got lost or misplaced.

The prosecution is not coming out clearly to say that they are unable to proceed as they lack witnesses and exhibits. The prosecution, in my view is not willing to take the risk of withdrawing the case and/or terminating the proceedings for fear of reprisals. They would rather that the Court does so. In that way they will hold the Court as a scape-goat.

When I took the oath of office, I swore to do justice to everyone who appears before me without fear of favour. In respect of this case, I have been faced with various challenges in the face of the prosecutions inactivity. I think a time has come for me to uphold my oath of office and terminate these proceedings beholden to the golden principle that there must be an end to litigation.

Having so said, I take the responsibility of terminating these proceedings under section 206(i) of the Criminal Procedure Code. I have done this in the larger interest of justice and to uphold the rule of law.

The accused is accordingly discharged.

It is so ordered.

Dated and delivered at Nairobi this 29<sup>th</sup> day of September, 2011.

**N.R.O OMBIJA  
JUDGE**