



**Republic v Farah alias Issa (Criminal Case E085 of 2022)
[2024] KEHC 15725 (KLR) (Crim) (13 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15725 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL CASE E085 OF 2022
K KIMONDO, J
DECEMBER 13, 2024**

BETWEEN

REPUBLIC PROSECUTOR

AND

MAHADH FARAH ALIAS ISSA ACCUSED

RULING

1. The principal issue is whether the court should accept the plea agreement dated 17th May 2024 and executed on 22nd May 2024 by the Director of Public Prosecutions (hereafter the DPP). In that agreement, the accused wishes to plead guilty to the lesser but cognate offence of manslaughter. However, the family of the victim is completely opposed to the proposal for reasons that I will deal with shortly.
2. The background is that the DPP charged the accused with murder contrary to section 203 as read with section 204 of the Penal Code; the particulars being that on the 11th September 2022 at Maida Apartments, Eastleigh Area, Starehe Sub-County within Nairobi County he murdered Abdifatha Hassan Baare alias Mrefu.
3. He pleaded not guilty. The prosecution called ten witnesses. At the close of its case and on 4th December 2023, the court in a considered ruling found that the Republic had marshalled evidence sufficient to place the accused on his defence. A date for defence hearing was eventually set for 6th June 2024 on which date the accused was to make an election on the manner of his defence.
4. The victim’s family first lodged a chamber summons dated 5th June 2024 at the Judicial Review Division in Judicial Review Application No. E124 of 2024 seeking to quash the agreement through the writs of certiorari, prohibition and mandamus. The application was founded on the affidavit of the ex parte applicant, Hassan Abdifatah Hassan, of even date.



5. Following objections to the procedure and forum, the matter was transferred to the Criminal Division on 12th June 2024 and re-numbered as Miscellaneous Criminal Application No. E190 of 2024.
6. Granted that the murder case was alive at the Criminal Division, it was a misadventure to lodge separate judicial review proceedings in another division of the High Court. On 9th July 2024, I directed that the objections to the admission of the plea agreement be heard in the parent murder file.
7. The key objections by the victim's family are three-fold: Firstly, that the family was not consulted prior to execution of the plea agreement in contravention of section 137D of the Criminal Procedure Code. Secondly, that a previous proposal for plea agreement was formally rejected by the DPP on 27th November 2023 who wrote that "after careful consideration and consultation, we are not amenable to the accused's person request to enter into plea negotiations with the Republic". Thirdly, that the proposal is not only belated but made in bad faith as a "device to delay, frustrate or arrest the ultimate determination by the court".
8. The replying affidavit of the accused is sworn on 30th July 2024. The gravamen is that the DPP consulted with the victim's family or counsel in line with the Act and Regulations. It was submitted that whereas the victims must be accorded an opportunity to make representations, there is no requirement for their consent or concurrence with the accused's change of plea. Secondly, that the prosecutorial power of the Republic is exercisable only by the DPP in accordance with Article 157 (10) & (11) of *the Constitution*; and, that the victim's family are now trying to usurp that power. It was further argued that a plea agreement can be entered at any time before judgment and accordingly, the court has discretion to accept the present agreement.
9. The Republic relied largely on the grounds of opposition dated 15th July 2024. The primary arguments are as follows: Firstly, that the DPP had power to enter into the impugned agreement under the Article 157 (10) & (11) of *the Constitution* as read with section 5 (4) Of the Director of Public Prosecutions Act 2013. Secondly, that the plea bargaining was professional and in good faith; and, it complied with all the requirements of the law. Learned prosecution counsel went at length into the history of the offer for plea bargaining and the eventual acceptance by the DPP.
10. The learned counsel for the victims filed submissions dated 10th September 2024. The accused's submissions are dated 11th September 2024. The DPP did not file written submissions but made brief oral submissions at the hearing.
11. On 7th October 2024, I heard further arguments from all the learned counsel for the DPP, the accused and family of the victims.
12. My finding is as follows. It bears repeating that although the accused has been found to have a case to answer, he is still deemed innocent. He has not embarked on his defence yet. The submission by the family of the victim that the plea bargaining is belated is understandable. However, under section 137A of the Criminal Procedure Code, the window for receipt of a plea agreement has not shut. For clarity, subsection 3 thereof provides:

A plea agreement under subsection (1) shall be entered into only after an accused person has been charged, or at anytime before judgement [underlining added].
13. I will thus proceed with the inquiry to establish whether there is a valid plea agreement and whether it is acceptable by the court. But before doing so I wish to lay down the guiding principles and the key provisions of the law.



14. Under Article 157 of *the Constitution*, the DPP has power to commence and prosecute criminal cases. Under sub-article 10, he “shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority”.
15. The only caveat is that the DPP must have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.
16. In the homicide proceedings now before the court, the victim’s family are the most affected by the loss of their loved one. But so also is the general public. Despite their loss, the family of the victim cannot direct the DPP on whether to charge or enter into a plea bargain.
17. However, the DPP cannot enter into such negotiations without consultations with the victim’s family. This is important because under section 137A of the Criminal Procedure Code the plea agreement may provide for the payment by an accused person of any restitution or compensation. Furthermore, there is an explicit decree for consultation with the victims in section 137D of the Criminal Procedure Code which provides that:

A prosecutor shall only enter into a plea agreement in accordance with section 137A —

 - a. after consultation with the police officer investigating the case;
 - b. with due regard to the nature of and the circumstances relating to the offence, the personal circumstances of the accused person and the interests of the community;
 - c. unless the circumstances do not permit, after affording the victim or his legal representative the opportunity to make representations to the prosecutor regarding the contents of the agreement. [underlining added].
18. This right is reinforced further by section 9 of the Victims Protection Act which states:

9.

 - (1) A victim has a right to-
 - (a) be present at their trial either in person or through a representative of their choice;
 - (b) have the trial begin and conclude without unreasonable delay;
 - (c) give their views in any plea bargaining.....
[underlining added]
19. The extent and right of the victims to participate at the trial has now been clearly delineated by the Supreme court in *Joseph Lendrix Waswa v Republic*, Supreme Court Petition No. 23 of 2019 [2020] eKLR.
20. It may as well turn out that the victim’s family may not concur in the decision by the DPP and the accused to enter into plea bargaining. But they must have their say. The ultimate decision however as to whether or not to accept the plea agreement would be that of the trial judge and subject to the procedure and requirements of sections 137A-O of the Criminal Procedure Code.



21. Section 137A above provides that:
- Subject to section 137B, a prosecutor and an accused person or his representative may negotiate and enter into an agreement in respect of—
- a. reduction of a charge to a lesser included offence....
22. An offer for a plea agreement may be initiated by the prosecutor, an accused person or his legal representative. The court must be notified by the parties of their intention to negotiate a plea agreement. Under section 137C (3), the court shall not participate in plea negotiation between a public prosecutor and an accused person.
23. The impugned plea agreement can be traced to a letter dated 8th April 2024 by counsel for the accused addressed to the DPP indicating that their client wished to plead guilty to the lesser charge of manslaughter. On 15th May 2024, the DPP sent a draft plea agreement to the accused for consideration. Of importance is that the letter in the last paragraph stated that “as per the ODPP Plea Bargain Rules and Guidelines, we have written letters to the IO and victims seeking their comments on this issue. The ODPP has the final decision-making capacity on this issue”. I find that this fully complied with section 137A.
24. So, was the family of the victims consulted as required by section 137D above and section 9 of the Victims Protection Act that I discussed earlier? This was not the first attempt at plea bargaining. The previous proposal was formally rejected by the DPP on 27th November 2023 who wrote that “after careful consideration and consultation, we are not amenable to the accused’s person request to enter into plea negotiations with the Republic”.
25. Learned counsel for the victim’s family, Mr. Akello, conceded that the family received a letter from the DPP dated 15th May 2024 informing them that the accused had made a new proposal for plea bargaining. In part B of their submissions headlined “undisputed facts” they state that “vide letters dated 22nd May 2024 both the investigating officer and the victim’s family opposed the impugned agreement, with the family requesting that the defence hearing proceed on 6th June 2024 as scheduled”.
26. Learned counsel, Mr. Akello, takes up further issue with the agreement for being undated and that the DPP executed the plea agreement on 22nd May 2024, the same date the investigating officer and the victims expressed their opposition to the matter. Paraphrased, I was urged to find that it was pre-determined or in bad faith.
27. I have looked at the plea agreement filed in court. It bears the date of 17th May 2024 which is the date when it was executed by both the accused (by thumb-print) and his lawyers, Messrs Nchogu, Omwanza & Ombati. On page 1, it has a receipt date at the ODPP on 17th May 2024. It was then executed on 22nd May 2024 by Ms. Gikui Gichuhi, Head of Homicide and Ms. Millicent Kigira, Senior Prosecution Counsel. It may thus well be, as submitted by Ms Gikui, that the copy given to the victim’s family’s counsel earlier was undated.
28. I agree with the learned counsel for the victims that between the 15th May 2024 and the 22nd May 2024 afforded little time for consultation. But I have also kept in mind that in the letters dated 22nd May 2024 by both the investigating officer and the victim’s family, they flatly rejected the plea agreement and preferred to have the murder trial concluded. What this means is that the position of the investigating officer and the victim’s family was given and their position seemed to be final.
29. I remain at serious loss why the DPP made a turn-around to accept the agreement, but in view of the provisions of Article 157 (10) & (11) of *the Constitution*, and in the absence of clear evidence that



he was motivated by other considerations other than those in the public interest, I will let the matter rest. I also stated earlier that whereas the victim's family strongly object, they cannot direct the DPP to continue with the murder charge or to abort the plea bargain.

30. Furthermore, I am alive that the accused is not being released. Rather, and subject to full compliance with to the procedure and requirements of sections 137A-O of the Criminal Procedure Code, he would be pleading his guilt to the serious felony of manslaughter and which itself carries a sentence of up to life imprisonment. The victim's family still retain the right to be heard at those critical stages of sentencing. The lesser I say about it the better.
31. For all of those reasons, the chamber summons dated 5th June 2024 by the victim's family is dismissed. The court shall proceed to record the plea agreement on a date that I shall now grant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF DECEMBER 2024.

KANYI KIMONDO

JUDGE

Ruling read virtually on Microsoft Teams in the presence of-
Accused.

Ms. Tum for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. Odongo holding brief for Mr. Akello for the victim's family instructed by Sheikh & Shariff Advocates.

Mr. E. Ombuna, Court Assistant.

