



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL CASE NO. 14 OF 2018**

**REPUBLIC.....DPP**

**VERSUS**

**MUSEMBI MUSYOKA MUSEMBI.....RESPONDENT**

**RULING**

1. The accused, Musembi Musyoka Musembi, was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. Particulars of the offence are that on the 4<sup>th</sup> day of April, 2018 at Mwamutsefu Village, Mwereni Location, Lunga Lunga Sub-County within Kwale County murdered Musyoka Musembi Mutune.

2. A Notice of Motion application dated 19<sup>th</sup> March 2021 brought under Certificate of Urgency, seeks that leave be granted to the family of the deceased who are the complainants in the case to withdraw charges against the accused person in order to promote reconciliation. The application is supported by the Affidavit of Ruth Kanini Kaluhi, PW1 herein, sworn on 19<sup>th</sup> March 2021.

3. In arguing the application, Mr. Magolo, counsel for the accused argued that under Article 159 (2) of the constitution, courts and tribunals are encouraged to promote other forms of resolution. Further, withdrawal of complaint by the complainant is provided for under Section 204 of the Criminal Procedure Code. Counsel further argued that Ruth Kanini is a spouse of the deceased and a member of the primary victim's immediate family and her concerns need to be addressed. Also, section 3(b)(iii) of the Victim Protection Act promotes reconciliation in appropriate cases by means of a restorative justice response. Section 4(2)(b) of the Victim Protection Act provides that every victim is, as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her is taken. Article 48 of the Constitution provides that states shall ensure access to justice for all persons. Counsel stated that the application seeks restorative justice by holding the offender accountable.

4. Ms. Karanja, counsel for the state opposed the application and made reference to the filed grounds of opposition dated 31<sup>st</sup> May 2021 by stating that the Republic is the lawful complainant on behalf of the deceased and it has a stake in such criminal matters notwithstanding views of family members. The state was willing to plea bargain but the accused did not pursue that option. Ms. Karanja stated that the applicant still denies his role in the crime, therefore, the issue of restorative justice does not apply. Withdrawal under Section 176 of the Criminal Procedure Code is limited to misdemeanors and excludes felonies. The section talks about reconciliation in appropriate cases but this is not an appropriate case. The applicant has already been placed on its defence, the application should be dismissed and the matter set down for hearing.

**Analysis and Determination**

5. In *Juma Faraji Serenge alias Juma Hamisi v. Republic* [2007] eKLR, It was held as follows:-

**“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.”

6. In *Republic v. Abdulahi Noor Mohamed (alias Arab)* [2016] eKLR, court held the position that 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. The court disagreed with the decision in High Court Criminal Case No. 86 of 2011 [2013] eKLR, *Republic v. Mohamed Abdow Mohamed* where the court proceeded to allow the application for withdrawal, citing the powers of the Director of Public Prosecutions to discontinue proceedings. Lesiit, J. stated that parties ought to have reduced the settlement into a plea agreement and presented to the court. Further, the court held as follows:-

**“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.”**

#### **Conclusion**

7. After consideration of submissions by both counsels, I find that the application lacks merit. Therefore, it is disallowed. The matter shall proceed for defence hearing.

**Dated, signed and delivered in Open Court/online through MS TEAMS, this 16<sup>th</sup> day of September 2021**

**HON. LADY JUSTICE A. ONG’INJO**

**JUDGE**

#### **In the presence of:-**

Mohamed - Court Assistant

Ms. Keya for DPP

Mr. Magolo for Accused – No appearance

**Order:-** Defence hearing on 21.10.2021. Notice to defence counsel.

**HON. LADY JUSTICE A. ONG’INJO**

**JUDGE**