REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. E048 OF 2021

REPUBLIC.....PROSECUTOR

=VERSUS=

PETER KINOTI NYAMU.....ACCUSED

RULING

Introduction

1. Immediately upon taking plea in this case on 8/9/021, the accused who is charged with murder contrary to section 203 as read with 204 of the Penal Code applied to be released on cash bail and for the termination of the charge on the ground that the family of the victim had after "a series of meetings resolved not to proceed with the charges".

2. The DPP through Ms. Nandwa Prosecution Counsel did not oppose bail being granted but objected to the terms thereof being cash bail as requested by the accused. The DPP suggested that a bond be imposed on the accused "to avoid the accused absconding and in order to secure attendance."

3. Eventually the Court approved the released of the accused on bond in the sum of Ksh.300,000/- with one surety of the same amount, and deferred the ruling on the application for termination of the charges, which is the subject of this ruling.

Application for withdrawal/termination of the Charge.

4. The application for withdrawal of the murder charge is based on an affidavit sworn on 25/8/2021 by the mother, 2 brothers and 2 cousins of the deceased and drawn by M/S Mutura, Mwenda & Co. Advocates for the deceased's family as follows:

> *"1. THAT we are Kenyan adults of sound minds and dispositions and members of the Meru Community and strict observers of the Kimeru Cultural practices and traditions and well versed with the matters herein hence competent to make and swear this affidavit.*
>
> *2. THAT we are related to the late Morris Mutuma by virtue of being his mother, two brothers and two cousins respectively.*
>
> *3. THAT we are aware that the deceased sustained fatal injuries on 30th July 2021 occasioned to him by APC PETER KINOTI NYAMU.*
>
> *4. THAT the Office of Director of Criminal Investigations Meru has consequently recommended APC PETER KINOTI NYAMU be charged with the capital offence of murder.*
>
> *5. THAT that the family members and the community of the deceased has sat to deliberate on the matter and resolved to end the dispute in a traditional manner and amicably to safeguard the cordial relationship in the community.*
>
> *6. THAT the pursuing the court process to establish who is to blame for the death of the deceased will go a big way into prejudicing/jeopardizing the existing good relationship amongst the members of the two families and the community at large.*
>
> *7. THAT members of the family of the deceased have had a series of meetings with their clan and community members and resolved that the dispute be resolved by way of traditional mechanisms and not through the court process.*
>
> *8. THAT charging APC PETER KINOTI NYAMU with the capital offence of murder would go contrary to the intention of the family of the deceased, the clan and the community of the deceased and contrary to the public interest and the interests*

9. THAT it would be atrocious and undesirable to charge the officer oblivious of the intentions of the family and the community who have done far reaching attempts to resolve the matter traditionally but amicably.

10. THAT the family of the deceased and APC PETER KINOTI NYAMU have reconciled their minds and felt that in the interests of justice the matter be marked as settled to the best interests of the family and community.

11. THAT the family of the deceased is ready to move on and are longing for the matter to be laid to rest without preference of charges to anyone

12. THAT we swear this joint affidavit seeking the office of director of public prosecutions to advice against the preference of any charges against APC PETER KINOTI NYAMU.

13. THAT this application is made in outmost good faith without any malice whatsoever in the interests of the administration of justice.

14. THAT what deposed to herein above is true to the best of our knowledge information and belief."

5. On the basis of the said affidavit, counsel for the family of the deceased has sought the withdrawal of the murder charge by the DPP by a letter to the DPP dated 25/8/2021 copied to the court, which is in the following terms:

"RE: APPLICATION AGAINST PREFERENCE OF MURDER CHARGES TO APC PETER KINOTI NYAMU- IN RESPECT TO THE DEATH OF MORRIS MUTUMA.

We have been instructed by JOYCE KINAITI MBURUNG' A, WILFRED MWONGELA MBURUNG'A, FESTUS MUREGA MBURUNG'A, JOSHUA MUTWIRI KAMENCU and NICHOLAS GITONGA KAIMENYI, the mother, the two brothers and two cousins of the late Morris Mutuma (deceased) (hereinafter referred to "our clients") under whose instructions we seek to address you as hereunder;

That on or about 30th July 2021, the deceased Morris Mutuma sustained fatal injuries that led to his demise and the Office of Director of Criminal Investigations Meru has recommended APC PETER KINOTI NYAMU be charged with the capital offence of murder. Further particulars are within your knowledge and purview as per the DCI report addressed to your office by the Office of Director of Criminal Investigations dated 12th August 2021. That we as the family of the deceased are not desirous of pursuing any charges intended to preferred to APC PETER KINOTI NYAMU owing to the following reasons;

a. That the family members and the community has sat to deliberate on the matter and resolved to end the dispute in a traditional manner and amicably to safeguard the cordial relations ship in the community.

b. The pursuing the court process to establish who is to blame for the death of the deceased will go a big way into prejudicing/jeopardizing the existing good relationship amongst the members of the community.

c. That members of the family of the deceased have had a series of meetings with the clan and community members and resolved that the dispute be resolved by way of traditional mechanisms and not through the court process.

d. Charging APC PETER KINOTI NYAMU with the capital offence of murder would go contrary to the intention of the family of the deceased, the community of the deceased and contrary to the public interest and the interests of the administration of justice.

e. It would be atrocious and undesirable to charge the officer oblivious of the intentions of the family and the community who have done far reaching attempts to resolve the matter traditionally but amicably.

f. The family of the deceased and APC PETER KINOTI NYAMU have reconciled their minds and felt that in the interests of justice the matter be marked as settled to the best interests of the family and community.

g. The family of the deceased is ready to move on and are longing for the matter to be laid to rest without preference of charges to anyone We have enclosed an affidavit sworn by the mother and the two brothers of the deceased to that effect and seek that your good office be guided accordingly and advice against the preference of any charges against APC PETER KINOTI NYAMU to ensure justice prevails. We humbly beseech you to exercise your prosecutorial powers objectively.

Yours faithfully,

Joyce Kinaiti Mburung'a (Mother)

Wilfred Mwongera Mburung'a (Brother)

Festus Murega Mburung'a (Brother)

Joshua Mutwiri Kamencu (Cousin)

Nicholas Gitonga Kaimenyi (Cousin)

For Mutura Mwenda & Co Advocates."

Submissions

6. In urging the termination of the murder charge, counsel for the accused, Mr. Maranya, relied on the affidavit of 25/8/2021 by the family of the deceased and their counsel's letter of 17/8/2021, as follows:

> *"I refer to Letter dated 17/8/2021. Affidavit of the Deceased's family members sworn on 25/8/2021. The family requests that the charges be withdrawn as there had been a series of meetings, which has resolved not to proceed with the charge.*
>
> *They consider that the charges will affect the cordial relations between them. They have reconciled and they do not desire to proceed with the trial.*
>
> *I rely on R. v. Mohamed Abdow Mohamed (2013) eKLR and R. v. Musili Ivia & Another (2017) eKLR. The request has been made by the entire family of and extended family who are present in court and the leaders of the community and clan elders."*

7. The DPP, through Ms. Nandwa, Prosecution Counsel, opposed the application for withdrawal of the charges urging that it was the complainant in the matter as follows:

> *"The matter is a felony and it can only be withdrawn by the DPP since we are also the complainant. I refer to Article 157 (11) of the Constitution.*
>
> *I refer to R. v. Mulala (2019) eKLR at p. 19 where Musyoka, J. held that complainant is the DPP and we are the ones who can withdraw a charge.*
>
> *I also refer to Article 159 (2) (a) of the Constitution as read with (3) that ADR should only be applied where it is not repugnant to justice and inconsistent with the Constitution or any other law. I refer to section 3 (2) of the Judicature Act and section 176 of the Criminal Procedure Code that matters of reconciliation cannot be done in felony offences but only in misdemeanours. I refer to R. v. Abdullahi Noor Mohamed at p. 19 on section 176 applying to misdemeanor and not felony.*
>
> *I pray that the matter proceeds to hearing."*

8. On his own behalf the accused stated that he was 24-year old public officer.

Determination

9. The issue in this matter is whether the court shall allow withdrawal of a murder charge at the behest of the family of the deceased person pursuant to Article 159 of the Constitution for Alternative Dispute Resolution.

10. At the outset the court must note the objection of the DPP to the proposed withdrawal of the charge and consider whether the withdrawal may be permitted, the objection by the DPP notwithstanding.

11. In the two decisions of persuasive authority relied on by the accused's counsel the DPP fully supported the withdrawal of the charges, and was indeed the applicant for the withdrawal. In ***Mohamed Abdow Mohamed***, supra, it was the prosecution counsel for the DPP who *"proceeded on the instruction of the DPP to make an oral application in court to have the matter marked as settled…."*

In allowing the application, the court (R. Lagat Korir, J.) in ***Mohamed Abdow Mohamed*** considered that *"under Article 157 of the Constitution the Director of Public Prosecution is mandated to exercise state powers of prosecution and in that exercise may discontinue at any stage criminal proceedings against any person."*

12. In ***Musili Ivia,*** supra, the court (Dulu, J.) was moved by the principal Prosecution Counsel for the DPP who informed the court that *"clan members of the deceased and the accused had approached their office requesting termination of the criminal proceedings, as they wanted to pursue amicable settled on issue of the death of the deceased."* The learned Judge the considered that:

> ***"Under Article 157(6) and (8) of the Constitution of Kenya 2010, the Director of Public Prosecutions has power to discontinue criminal proceedings subject to the permission of the court. He has now asked for such discontinuance of the criminal proceedings, on the above reconciliation agreement. He has stated that as a result of the settlement reached he cannot be able to avail prosecution witnesses. In my view, this court is entitled to promote the reconciliation as requested and I thus allow the request of the Director of Public Prosecutions and order that the criminal proceedings herein against the two accused herein for murder be and are hereby discontinued."***

13. This court had opportunity to deal with principles for withdrawal or termination of criminal proceedings in ***Kelly Kases Bunjika v Director of Public Prosecutions (DPP) & another*** **[2018] eKLR** as follows:

"*Principles for the termination of criminal proceedings*

6. Except in cases where criminal charges are terminated by operation of the law where upon death of an accused there is no person to be tried, convicted and sentenced in a trial, there are three ways upon which a criminal charge may be terminated by ***act of the parties****, and it is opportune in this case to discuss the principles involved. A criminal case may be terminated by act of the parties, by reconciliation under section 176 of the Criminal Procedure Code (CPC); withdrawal or discontinuance of the charge by the complainant (s. 204 of the CPC) or the prosecutor (Art. 157 (6) (c) of the Constitution and s. 87 of the CPC); and alternative dispute resolution agreement pursuant to Article 159 (2) (c) of the Constitution. A criminal case may also terminate partly by act of complainant and by operation of the law under section 202 of the CPC, where the complainant fails to attend.*

Reconciliation in personal or private cases

7. In cases of common assault, or any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, section 176 of the CPC allows the Court to promote reconciliation, encourage and facilitate the settlement, in an amicable way, of proceedings, on terms of payment of compensation or other terms approved by the Court. See ***Medardo v. R*** *(2004) 2 KLR 433 and* ***Shen Zhangua v R****, High Court at Nairobi Miscellaneous Criminal Application 396 of 2006.*

Withdrawal of Charge

8. In accordance with section 204 of the CPC, a complainant may withdraw the complaint before the court makes a final order in the matter and the court has discretion as to whether to allow or reject the withdrawal when satisfied of existence or otherwise of sufficient grounds for permitting such a withdrawal. See ***R v Malek Abdulla Mohamed,*** *High Court at Kisumu No.113 of 1978.*

Alternative Dispute Resolution

9. The court is aware of the persuasive High Court decisions in ***R v. Abdow Mohamed*** *(R. Korir, J.) and* ***R v. Juliana Mwikali Kiteme*** *(Dulu, J) where the courts have permitted the termination of serious charges of murder on the grounds that the families of the accused and the victim had reconciled. While the Court, respectfully, takes the view that each case shall depend on its circumstances, a general principle may be laid down flowing from constitutional criteria for the prosecution, the withdrawal or termination of criminal cases in terms of Article 157 (11) of the Constitution by which the DPP is obliged to consider "****public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.****"*

10. It must be demonstrated by the accused or the prosecutor who seeks the withdrawal or termination of a criminal case that, in the wording of the Constitution, ***the discontinuance*** *(read settlement, withdrawal or termination of the criminal case) is justifiable under the parameters of the considerations of public interest, interests of justice and need to prevent abuse of the legal process. Indeed, in* ***Juliana Mwikali Kiteme*** *and* ***Abdow Mohamed*** *cases, supra, it was the DPP who made the application for settlement of the cases pursuant to alternative dispute resolution mechanism. See also* ***Republic v. Faith Wangoi,*** *Kajiado HC Criminal Misc. Application No. 1 of 2015.*

11. Kimaru, J. in ***Dennis Wanjohi Kagiri****, supra, did not allow the withdrawal of the charges before the commencement of the trial in the trial court. The learned judge quashed the conviction because the circumstances of the case raised a doubt as to the charge and not because it was settled by ADR, and only used the fact of the complainant's application to withdrawal the complaint as "raises reasonable doubt that the appellant robbed the complainant."*

12. ***R v. PKM****, supra, is clearly distinguishable as a matter of personal nature arising in a matrimonial context in which the learned judge promoted reconciliation under Article 159 (2) (c) of the Constitution and held as follows:*

"*Having made the above observations, I make marked distinction between the instant case and the cited case law being* ***Nairobi High Court Petition No. 21 of 2015 (Supra). The instant case is of a personal nature involving two persons who are closely connected to each other by marriage. In the event of a dispute between them where the offence is not so grave, the best that the court can do and that social justice demands is to promote reconciliation for the sake of unity of the family.*** *Doing the contrary dismantles the family and works against a cohesive society and nation at large. To the contrary, the latter case involved a case of corruption which in the public interest could not be withdrawn. Although this case relates to a case of threat to kill, the circumstances under which the Respondent told the complainant he would kill her was explained by him without a rebuttal by the Applicant."*

13. This court had opportunity in ***Mary Kinya Rukwaru v. Office of the Director of Public Prosecutions & Another,*** *High Court at Nairobi Petition No. 285 of 2016, to consider the principles for approval of withdrawal of a case pursuant to ADR, where it held that although the Court has power to allow alternative dispute resolution mechanisms, the concurrence of the DPP in addition to any agreement between the complainant and the accused was necessary.*

14. In ***Rukwaru****, the Court considered the decision in* ***Abdow Mohamed****, supra, but declined to terminate the criminal charges of causing death by dangerous driving entered into by the personal representatives of the deceased and the accused, without concurrence of the ODPP reasoning that it was the DPP's responsibility under Article 157 of the Constitution to take into consideration public interest. In the present case, the charge of robbery with violence being prevalent in this areas is also of concern to the DPP who ought to concur in its withdrawal by the complainant under section 204 of the CPC or under the permissive provisions of the ADR mechanisms of Article 159 (2) (c) of the Constitution."*

14. While the court respectfully agrees that in a proper case the court may terminate or allow withdrawal or discontinuance of criminal proceedings for offences other than common assault under section 176 of the Criminal Procedure Code, the termination, withdrawal or

discontinuance must be with approval of the Director of Public Prosecutions (DPP) who is the custodian of the state's prosecutorial powers under Article 157 (6) of the Constitution, unless his non approval may successfully be challenged on applicable principles. I would, however, agree with Lesiit, J. (as she then was) in ***R. v. Abdullahi Noor Mohamed*** (2016) eKLR that section 176 CPC reconciliation is not available for murder cases.

15. In a Paper entitled ***INTERPRETING THE CONSTITUTION: BALANCING THE GENERAL AND THE PARTICULAR*** published in the book ***ETHNICITY, NATIONHOOD AND PLURALISM: KENYAN PERSPECTIVES***, edited by Yash Pal Ghai and Jill Cortrell Ghai (2013) learned author Yash Pal Ghai has commented on the decision of ***Mohamed Abdow Mohamed*** as follows:

> ***"Even if one endorses the collective method of dispute resolution, there are considerable differences between the situation in the arid zones of northern Kenya, with its pastoral communities, in scarcely populated areas and little of the apparatus of the formal justice, with the circumstances of the Mohamed case. Here the killing took place in the capital city, in a highly urban area. Nairobi has a good supply of courts, prosecutors and lawyers. Disputes in urban areas are more likely to be individual rather than community oriented. The safety of people inside or outside the community from criminals suffers if they are dealt with in the traditional manner instead of being tried openly in court, which ensures publicity. By imprisoning the guilty accused, he or she is withdrawn from society for periods of time.***
>
> ***It will create confusion in the law. Does the doctrine of the case apply only to murders? What about other transgressions of the criminal law? Can customary practices override the law? If we accept the traditional practices of one community, can we deny it to others? It would seem that the neither the DPP nor the judge assumed that it was confined to religious rules. Can we have a system of criminal law that applies unequally as among citizens and other, depending on the community they belong to?***
>
> ***If we were to follow the Mohamed, we would weaken the state legal system and the authority of the courts and the police, replacing them in significant ways by "traditional" (communal) notions of justice and institutions. It would increase problems of law and order. It would undoubtedly weaken the sense of national unity which comes from a country's legal system-and notions of justice and fairness. It would certainly upset the balance between the state, community and the individual in the constitution.***
>
> ***There are further problems with this case, as noted by Pravin Bowry (a leading Kenyan criminal lawyer) (2013). He says that, most unusually for criminal proceedings, evidence was received on the basis of affidavits. He raises pertinent questions: "Does the case now dictate that in Kenyan criminal law customary and Islamic law are applicable? Can a criminal offence by excused by law by payment of bloodmoney? Has the court jurisdiction or mandate to "settle" criminal cases, receive affidavit evidence in murder trials and "discharge" an accused in a ruling without conviction?" He reminds us of Article 2(4) of the constitution which states that the constitution is the supreme law of the country and "any law including customary law that is inconsistent with it is void to the extent of inconsistency, and any act or omission in contravention of this Constitution is invalid". The approach of the judge also negates the purposes of criminal law, including those of punishment. He criticises the judge for failing to consider the extent to which criminal responsibility has developed in the institutional context, including policing, criminal procedure and practices of punishment. There is also very real danger of further corruption creeping into the system of criminal justice if this case was upheld-of the communal groups paying money to the police, or DPP or the judge (or all together) to ensure endorsement of the traditional settlement.***
>
> ***It is clear that the functions we associate with the criminal law would not be achieved with any degree of effectiveness, functions such as providing predictability, so they know what acts are prohibited and the punishment for them, so they can organise their conduct and activities accordingly. In this way it fulfils its main mission of maintaining order in society. Its three principal tasks are retribution (punishment), deterrence, and rehabilitation. By ensuring that criminals will be punished, it prevents the public taking the law into their hands, with its undesirable consequences. This way the criminal law and procedure ensure security to the people and protect their rights. None of these concerns were considered by the court."***

For my part, I am respectfully content to leave the decision to its facts, with the comfort that the withdrawal was sanctioned and moved by the DPP.

Who in the CPC is "the complainant"?

16. The traditional dichotomy in the understanding of the term "complainant" in section 202 and 204 of the Criminal Procedure Code which allow, respectively, for the acquittal of an accused where ***the complainant*** does not attend court for hearing and withdrawal of a charge by ***the complainant***, has caused much confusion in criminal justice. The problem has been put paid by Article 157 (6) of the Constitution which gives the DPP authority to take over and continue or discontinue criminal proceedings instituted by any person. A court cannot allow a withdrawal of a charge, which the DPP, in accordance with his constitutional mandate seeks to take over and or continue!

17. I would respectfully agree with Musyoka, J. in ***R vs Judith Achola Mulala*** (2019) eKLR on the learned judge's appreciation of the term complainant under the Criminal Procedure Code as follows:

> ***"19. My view of this is that the complainant, within the context of the Criminal Procedure Code, would be that person who initiates the complaint that is envisaged in section 89 of the Criminal Procedure Code. That complaint, or charge, is what initiates the criminal proceedings. Under the Kenya criminal justice system, criminal proceedings are initiated in court by the Director of Criminal Prosecutions, and it is that office that conducts the actual prosecutions. My understanding, therefore, is that the complainant is the prosecutor, who stands for the Republic or state in criminal proceedings. Proceedings are started, continued and terminated at the behest of the state through the prosecutor. It is the state through the prosecutor that is the party to criminal proceedings, and the matter is styled as a dispute between the state and the accused person. Reference, therefore, to complainant in the Criminal Procedure Code must be reference to the prosecutor, the initiator of the criminal case.***

20. The complaint envisaged in the Criminal Procedure Code is not that made by the victim of the crime with the police. The police may refer to the information they receive from a victim of a crime as a complaint, and to they may even refer to the victim to that extent as a complainant, but those words as used in the Criminal Procedure Code are not used in that context. They can only be construed in the narrow context of the information laid before a court by the person initiating the criminal matter formally in court, and to refer to that person. I have read and reread he provisions of the Criminal Procedure Code, and I am not persuaded that the word complainant refers to anything more than the person who initiates the cause in court through a complaint."

18. The cases of *Mohamed Abdow Mohamed* and are distinguishable in that in those cases where the court allowed withdrawal of the charges, the applications thereof were made by the DPP. In this case, however, the DPP is opposed to the withdrawal of the charge, and the court must uphold the DPP's constitutional prosecutorial discretion under Article 157 (11) of the Constitution.

Conclusion

19. The DPP's clear mandate may only be interfered with where it can be shown that by cogent evidence, in insisting on proceeding with a charge, the DPP is being unreasonable on the facts of the case, and or that by so doing, the DPP is violating the rights of the accused to fair trial under Articles 25 and 50 (2) of the Constitution or otherwise abusing the office of the DPP or the process of the court to serve motives ulterior to prevention of crime, prosecution and punishment of offenders under the state's prosecutorial mandate under Article 157 of the Constitution.

20. As the DPP opposes the withdrawal of the murder charge herein, and it has not been shown that in so doing, the DPP is acting unreasonably, or in violation of the accused's rights to fair trial, or in abuse of office or process of the court, or against public interest, this court is obliged to uphold the DPP's authority under Article 157(11) of the Constitution.

ORDERS

21. Consequently, for the reasons set out above, the application by family of the deceased for withdrawal of the murder charge against the accused herein, which is opposed by the DPP, is declined.

22. The case shall proceed to trial before the court on a date to be fixed in consultation with the counsel for the DPP and for the accused person.

Order accordingly.

DATED AND DELIVERED THIS 14TH DAY OF OCTOBER 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Maranya, Advocate for the Accused.

Ms. Nandwa, Prosecution Counsel for the Respondent.