

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 2 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

JAMES MUSYOKI MUTINDA.....ACCUSED

R U L I N G

1. **JAMES MUSHOKI MUTINDA**, the accused herein is charged with the offence of **Murder Contrary to Section 203** as read together with **Section 204** of the **Penal Code**. The particulars are that on 29th December, 2016 at Kanyangi Location Lower Yatta within Kitui County, he murdered one **WAMBUA NYWAVA**.
2. The accused denied committing the offence and the prosecution lined up six witnesses were heard by the trial judge Hon. Justice L.N.Mutende who has since moved on transfer. The Hon. Judge evaluated the evidence tendered and placed the accused on his defence on 19th November, 2019.
3. The record of proceedings shows that on 23rd July, 2020, both the defence and prosecuting counsel orally informed the court that there were negotiations going on which were likely to reach a settlement and requested for time to enter into plea bargain agreement. The court obliged and granted them upto 23rd September, 2020 to possibly reach a settlement.
4. On 23rd September, 2020 this court was informed by both the defence and prosecuting counsel that an agreement had been reached and that the same was in the process of being filed. This court gave the parties upto 13th October 2020 to file the aforesaid agreement but on 13th October 2020, the Office of Director of Public Prosecutions requested for more time stating that they needed to comply with procedures but did state which procedures required to be complied with and how. This court nevertheless granted the State its wish and fixed the matter for Mention on 9th November, 2020 to enable the parties file a plea bargain agreement.
5. On 9th November, 2020, the Director of Public Prosecutions through **Mr.Okwema** informed this court that they had not filed a plea bargain agreement but had instead opted to apply to discharge the accused as they no longer wanted his prosecution. The reasons given are that the two families of the deceased and the accused had reached a settlement and an affidavit had been filed to that effect sworn by **NDUKU NG'WAVA** (the mother to the deceased) on 9th November, 2020.
6. The defence expressed no objection in that regard and this court directed the State to file a formal Notice to withdraw the charge against the accused. The Officer of Director of Public Prosecutions has now filed a "*nolle prosequi*" dated 9th November 2020 informing this court of their intention to have the Criminal charge terminated under the **Provisions of Article 157 (6) (c) of the Constitution of Kenya**.
7. This court has considered the Notice of *Nolle prosequi* entered by the State. The same is not opposed.
8. It is important to note that under the Provisions of **Section 137 A (I a & (b) of Criminal Procedure Rule** a plea bargain can either result in a reduction of a charge or even withdrawal of the charge altogether. The State had no reason to abandon plea bargain but with plea bargain, the latitude for the agreement is extensive and includes matters to do with compensation *et cetra* as they are clearly spelt out under **Section 137 E of the Criminal Procedure Code**.
9. Having said that I have considered the fact that the prosecution had closed its case and the accused has been found to have a case to answer and placed on his defence pursuant to **Section 211 of the Criminal Procedure Code**. This court would have been reluctant to accept the *nolle* from the State because this court is granted the discretion to either accept or reject the discontinuance under **Section 25(1) of the Office of the Director of Public Prosecution Article, 2013 and under Article 157 (8) of the Constitution of Kenya**. However I have considered the special circumstances obtaining which are as follows:

i. The accused is a youngman and though the Director of Public Prosecutions stated that he was 17 years at the time medical report filed which indicates he was 18 years when he committed the offence. The circumstances there was an altercation, there was no intention to cause serious harm or death to the deceased.

ii. The agreement reached by both the family of the deceased and the accuse shows that the application by the Director of Public Prosecution is in good faith and the same is reflective of the intention of both families in this month.

iii. This court was alerted and shown both the parents of the deceased and accused seated together in court which was indicative of the fact that there reconciliation between the two families was real and that there was no cohesion or pressure exerted to either family.

In the premises this court allows the Director of Public Prosecutions to discontinue the Criminal case against the accused person. He is hereby acquitted pursuant to the Provisions of **Article 157 (7)** of the Constitution of Kenya and shall be forthwith set at liberty unless he is lawfully held.

Dated, Signed and Delivered at Kitui this 11th day of September, 2020.

R. K. LIMO

JUDGE