



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL CASE NO. 24 OF 2016 [MURDER]

REPUBLIC.....PUBLIC PROSECUTOR

VERSUS

ELIAS PETER MUHUNYA1ST ACCUSED

DICKSON ODUOR OMOGA 2ND ACCUSED

RULING

1. By an information dated 16th December 2016, the accused persons herein Elias Peter Muhunya and Dickson Oduor Omoga were charged with the offence of **Murder contrary to Section 203 as read with Section 204 of the Penal Code Cap 63 Laws of Kenya**. The particulars of the charge are that on the 2nd day of December, 2016 at about 02.00 hours at Mboga Village, Hono Sub-Location within Siaya County, they Murdered one Maxwell Omondi Opino.
2. The accused persons appeared before Hon. Justice J.A. Makau – J., and pleaded not guilty and the trial commenced before the Hon. Judge. The accused persons were also released on bond pending trial vide a ruling of 11.1.2012. Thereafter, the case was set down for trial and the first 4 witnesses testified on 29.1.2018.
3. The Hon. Justice J.A. Makau – J. was then transferred from the station and when the matter came up for directions before me under Section 200 of the Criminal Procedure Code on 14.5.2018, the accused person sought and obtained an order to have the trial commence **de novo**. That was in their right.
4. However, in opposing the **de novo** hearing, Ms. Odumba Prosecution Counsel had submitted that there was possibility of interference with witnesses as the accused persons had been on bond since March 2017 and had interacted with witnesses. That the defence occasioned delay since 2016.
5. The allegations by Prosecution Counsel were denied by defence Counsel and in the ruling by this Court on 28.5.2018, the Court ordered for **de novo** hearing. Ever since, the matter has been fixed for hearing but on each occasion, either the defence Counsel were absent or in the case of the 2nd accused on 24.10.2018, Mr. Oyuko Advocate withdraw from acting for him for want of instructions hence this Court had to appoint another advocate for him as required by law in murder trials.
6. On another occasion, the advocate who was appointed to represent the 2nd accused persons left the jurisdiction of the Court hence the Court had to reappoint Mr. Ochanyo Advocate to represent him.
7. On 26.3.2019 this Court delivered a ruling to the effect that victims of offences in Murder trials too had rights and justice is for both parties to each case. Today, this matter is for hearing but the prosecution applies to terminate the proceedings on account that they are unable to trace witnesses. On 3.4.2019 the investigation Officer was said to be on transfer.
8. The provision of **Article 157(7) and (8) of the Constitution** are clear that the Director of Public Prosecutions may discontinue a Prosecution but such dis-continuation must be with the Permission of the Court.
9. The Court already heard some of the key witnesses in this matter but the transfer of the trial judge caused the delay compounded with the need to comply with the law to accord the accused persons an opportunity to elect to have the trial commence **de novo**.
10. The defence Counsel too have had their share of delaying the matter as they have either been unavailable or ceased to act for one of the accused persons thereby necessitating appointing other advocates on record.
11. The Prosecution has stated that witnesses who testified cannot be traced. The hearing took place long ago and it is possible that witnesses

may have left their places of abode. That cannot be said to be malicious on the part of the Prosecution.

12. In my humble view, the application is made in good faith. I see no malice or ill will as the complainant is dead and the Prosecution is therefore conducted in the Public Interest.

13. For the above reasons, I am satisfied that the application by the Prosecution is merited. The charges against the two Accused persons herein Elias Peter Muhunya and Dickson Oduor Omoga are hereby **withdrawn under Section 87(a) of the Criminal Procedure Code and Article 157 (7) and (8) of the Constitution**. The two accused persons are accordingly discharged. The sureties are also hereby discharged.

14. Orders accordingly. The file is closed.

Dated, Signed and Delivered at Siaya this 12th day of November, 2019

R.E. ABURILI

JUDGE

In the presence of:

Mr. Okachi Senior Principal Prosecution Counsel for the state

Mr. Oyugi Advocate for the 1st accused

Mr. Ochanyo Advocate for the 2nd accused

Both accused persons present

CA: Brenda and Modestar