

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 19 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

ABDIKADIR ALI HILOULE.....ACCUSED

RULING

1. The accused was brought to this court charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence being that on 23rd December, 2015 at Bulla Madhine village Bura Location within Tana River County murdered Yakub Dubow.
2. He pleaded not guilty and though the matter has come in court a number of times since December, 2015, no witness has testified so far.
3. On the 2nd October 2018, Mr. Okemwa learned Principal Prosecuting Counsel informed the court that by a written agreement dated 23rd July 2018 the family of the accused had indicated that they would prefer to settle this matter through other peaceful methods. Counsel submitted that in addition that agreement, an affidavit sworn on 20th September, 2018 by Aden Dubow Gonjabe a brother of the deceased has confirmed settlement through payment to the deceased's family. Another affidavit sworn on the 20th September, 2018 by Idris Duo Gojobe also another brother confirmed the same position.
4. Counsel submitted that in view of these developments, the witnesses are not likely to come and in any event, it is evident that the looming differences between the two families had now been cooled off because of these arrangements. Counsel mentioned to the court that the area Chief Yusuf Kuno, Chief Korati Location was present in court.
5. Counsel thus urged that in view of the provisions of Article 159 (2) (c), this could be a traditional way of resolving disputes which was not a violation of the law. The Prosecuting Counsel thus was of the view that in order to allow peace to prevail, the criminal proceedings herein be discontinued under section 25 of the Director of Public Prosecutions Act as the witnesses will not be able to come to court.
6. Mr. Nyagah counsel for the defence stated that his instructions were supporting the prosecution's position.
7. I have considered the circumstances of this matter. As I have not been availed any witness by the prosecution to tender evidence, the circumstances under which the offence occurred are not within my knowledge. I am now told by the prosecution that the two families of the deceased and accused have reconciled and that witnesses are not likely to come to court. I myself cannot force witnesses to come to court and testify, as ordinarily witnesses in criminal cases are brought to court by the Director of Public Prosecutions who brought the case in the first place. The Director of Public Prosecutions having indicated through the Prosecuting Counsel that he is not able to avail prosecution witnesses, I find no better option than to allow the discontinuance of the criminal proceedings herein in accordance with Article 157 of the Constitution and section 25 of the Office of the Director of Public Prosecutions Act 2012.
8. Since the accused is going to be discharged, the Director of Public Prosecutions still has a right to prefer charges and prosecute the accused person herein, if he chooses to do so.
9. I thus allow the request of the Director of Public Prosecutions and order that the criminal proceedings herein be and are hereby discontinued under section 25 of the Office of Director of Public Prosecutions Act. As no prosecution witness has so far testified in court, I order that the accused be and is hereby discharged.

Dated and delivered at Garissa this 16th day of October, 2018.

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George Dulu

JUDGE