



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL CASE NO. E138 OF 2021

REPUBLIC

(DPP)

PROSECUTOR

VERSUS

CHRISANTUS MWINAMO LUGONZO

1ST ACCUSED

GODWIN MACHISU IMBAKHALA 2ND

ACCUSED

RULING

1. The two Accused persons are charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on the 26th day of September 2021 at Virhembe village, Iguhu Sub-location of Kakamega South Sub-County, they murdered Moharam Moshi Juma.

2. The two Accused persons were arrested on 13th October 2021 and thereafter arraigned in court. They took plea on 29th October 2021 when they both entered a plea of not guilty. Subsequently the Accused persons were released on bond on 10th December 2021. The bond was for Kshs. 450,000/= each with one surety of like amount.
3. After case-conference, the matter was fixed for hearing on 6th March 2022 but on the scheduled date, Accused 1's surety informed the court that he needed time to trace the said Accused person who had been in court earlier but had taken off. A warrant of arrest was issued against Accused 1 but on 30th March 2023, he attended court and tendered an explanation for his failure to attend court which explanation was accepted by court. On the same date, Accused 1's surety was allowed to withdraw subject to Accused 1 securing an alternative surety.
4. On 6th July 2023 when the matter was scheduled for hearing, Accused 1 was absent again and warrants of arrest were issued against him. Summons were issued to the surety and hearing adjourned to 5th December 2023. The matter was mentioned severally to confirm whether

the warrants against Accused 1 had been executed and on 18th January 2024, still in the absence of Accused 1, his surety sought and was allowed to substitute his security with cash in the sum of Ksh. 450,000/= so that the court could release the title documents in respect to L.R. No. Idakho/Shivagala/2595 to him. The surety prayed that the said sum of Ksh. 450,000/= be forfeited to the State so that he could be discharged on the premise that he had tried to trace Accused 1 in conjunction with the DCI officers to no avail. The court allowed the application for forfeiture of the cash bail.

5. Thereafter, the matter was mentioned severally with no sign of Accused 1 and on 5th November 2024, the prosecution successfully sought to withdraw the charges against him under Article 157 (b) and (c) of the Constitution.
6. Although the matter was subsequently listed severally for purposes of Accused 2 taking a fresh plea to an Amended Information that excludes Accused 1, the prosecution sought instructions from the DPP and on 30th September 2025, applied to withdraw the matter under Article 157 of

the Constitution on the ground that the key suspect had absconded bail and they had been forced to discontinue the proceedings against him yet the evidence that they had could not sustain a conviction against Accused 2.

7. The Accused person did not object to the application.
8. The Director of Public Prosecution (DPP) has power under Article 157 of the Constitution to terminate criminal proceedings against any accused person at any state of the proceedings. Article 157 (6) (c) provides:-

“The Director of Public Prosecutions shall exercise State powers of prosecution and may—

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).”

9. I have reviewed the statements in the committal bundles as submitted by the prosecution. None of the material witnesses identified Accused 2 as among the men who attacked and killed the deceased. The assailant who was

identified by D3 and D4 was the 1st Accused. Accused 2 is only placed with Accused 1 by the Investigating Officer on the day of the attack. Clearly, there is no iota of evidence that would conclusively link Accused 2 to the murder.

10. What is apparent is that Accused 2 was a suspect because he was seen in the company of Accused 1 who was linked to the offence by a number of the witnesses. Without concrete evidence, a trial would be futile.

11. The DPP's power to initiate and conduct criminal proceedings is grounded on Article 157 (6) of the Constitution. However, the said power is not absolute. Article 157 (11) enjoins the ODPP to consider public interest, the administration of justice and the preventing of abuse of legal process as he exercises his power. Article 157 (11) provides:-

“In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

12. In **Praxidis Namoni Saisi & 7 others v. Director of Public Prosecutions & 2 others [2023] KESC 6 (KLR)**, the Supreme Court while considering the DPP's power to institute criminal proceedings and on whether there could be a review of the DPP's decision to charge rendered itself as follows:-

“12. Under article 157(6) of the Constitution, the DPP had power to institute and conduct criminal proceedings, and under article 157(10) exercised that power independently, free from external control. However, article 157(11) imposed a duty to act in the public interest, ensure the proper administration of justice, and prevent abuse of legal process.

13. Where criminal proceedings appeared to be instituted to settle personal scores, to abuse court process, or in circumstances where the case was manifestly untenable, the court could intervene.

14. Although the DPP was independent and not bound by any direction, control, or recommendations by any institution or body, failure

to meet the standards of article 157(11) of the Constitution invited judicial scrutiny under article 165(3)(d)(ii). In evaluating alleged abuse of prosecutorial powers, the following guiding principles, read with article 157(11), were relevant:

- a. where prosecution would amount to an abuse of court process, or quashing it would secure the ends of justice;**
- b. where a legal bar existed to the institution or continuation of proceedings;**
- c. where, taken at face value, the allegations did not constitute the offence charged; or**
- d. where there was no legal evidence, or the evidence manifestly failed to prove the charge.”**

13. Herein, the DPP has reviewed the evidence and found that it is insufficient to sustain the charge. It would be against public interest and an abuse of the process of the court for the trial to continue. Moreover, the continued trial would be inimical to the Accused’s right to a fair hearing as

envisaged by Article 50 (1) and 50 (2) (e) of the Constitution.

14. The evidence is glaring in its scarcity and failure to pinpoint the Accused as a viable suspect in the murder. It may be that there were grounds to suspect him, but it is trite that mere suspicion is not enough. If mere suspicion of a person were sufficient to found charges, myriad of Kenyans would find themselves in court. To sustain a charge, the evidence must be reasonable, and in the circumstances obtaining herein, there is no reasonable or tangible evidence that would persuade the court that Accused 2 is culpable for the homicide.
15. Having carefully considered the application and reviewed the witness statements that were referred to by the prosecution in its submissions, I find that the application is merited. It is allowed and Accused 2 discharged. Those are the orders of the court.

Dated, signed and delivered at Kakamega this 24th day of November 2025.

A. C. BETT

JUDGE

In the presence of:

Ms. Chala for the Prosecution

Ms. Kadenyi for the 1st Accused

Court Assistant: Polycap

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