

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VIHIGA
CRIMINAL CASE NO E001 OF 2024

REPUBLIC.....STATE

VERSUS

**NATHANIEL NGOTA EMINYIACCUSED
PERSON**

RULING

INTRODUCTION

1. At the heart of the submissions of the Accused person and the State in the question of justice. In other words, whose justice is it? The other pertinent question is the tension that has been caused by the applicability of two (2) provisions of the Constitution of Kenya, 2010.
2. On the one hand, there is Article 159 (2)(c) of the Constitution of Kenya that mandates courts to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and tradition dispute resolution mechanisms provided that those traditional dispute resolution mechanisms shall not in any way contravene the Bill of Rights, be repugnant to justice and morality or result in outcomes that are repugnant to justice or morality or be inconsistent with the Constitution or any written law as provided in Article 159(3) (a), (b) and (c) of the Constitution of Kenya.
3. On the other hand, Article 157(10) of the Constitution of Kenya stipulates that:-

“The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of

criminal proceedings and in exercise of his or her powers or functions, shall not be under the direction or control of any person or authority”.

4. Further Article 157(11) of the Constitution of Kenya provides that:-

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

5. The Accused person and the deceased’s family have entered into an Agreement under Alternative Justice System pursuant to Article 159 (2) (c) of the Constitution of Kenya in which a ceremony under the Maragoli Customs was performed for reconciliation purposes.

6. The court had occasion to speak to the deceased’s mother who was emphatic that the Accused person had a mental issue and that she did not want to pursue the case in court as she wished to live in harmony with him and his family. The Prosecution argued that the offence of murder was against the State and that there had been impunity by police officers to kill innocent people and hence the matter should proceed for trial.

7. This court noted that the deceased’s mother and family were entitled to retribution by the Accused person being punished. The deceased’s family was satisfied with the Maragoli Customary rites that were performed and they got their retribution. The traditions had an effect on the Accused person as a deterrence.

8. While this matter could proceed for hearing, the court saw difficulties in the Prosecution securing witnesses as the secondary victims wanted the Alternative Justice System (AJS) Agreement adopted by the Court to finalise the case today. The secondary victims could also come to court and become hostile or refractory. If they failed to come to court, the court could issue summons and impose sanctions that could be punitive to them.
9. There was no indication that the Accused person was acting in the course of his duty from the statements that were recorded by the police. The court, is therefore , cautious to conclude that the trial of this matter should proceed so as to find a strong signal to other police who may kill others. Police are members of the society and they may commit crimes outside the course of their duties. Setting a threshold for police officers for similar crimes like other offenders would be against the provisions of Article 27(1) of the Constitution of Kenya that provides that every person is equal before the law and has a right to equal protection and benefit of the law and Article 27(4) of the Constitution of Kenya that provides that the State shall not discriminate against a person on the basis of race, sex, pregnancy, marital status, health status, ethnic of social origin amongst other characteristics.
10. If the Accused person acted in excess of his duties, there were other mechanisms that were provided to bring him to book. Rejecting a settlement under Alternative Justice System merely to secure a conviction for the sake of it and when it was not evident

that the offence was committed in the course of duty would be akin to abuse of legal process that the office of the Director of Public Prosecutions (ODPP) was mandated by the Constitution of Kenya to guard against. The long and short of this court's opinion is that it should not disregard what the secondary victims had said and wished the court to do and direct that this matter proceed for trial as an example of what would happen to errant police officers.

11. This court has considered the case of **Republic vs Abdulahi Noor Mohammed [2016] KEHC 3005 (KLR)** where the court rejected an out of court settlement of a murder case on the ground that the charge was a felony, and hence settling the proceedings was prohibited. (GS, please re-check this paragraph. It looks like something is missing). This court respectively took a different view that there was nothing in law that prohibited settlement of serious charges outside court provided that it was in the interest of justice.
12. In this regard, this court associated itself with the holding of the court in **Republic vs Wanga & 2 others (Criminal Case No 45 of 2019) [2023] KEHC 27193 (KLR)** where in a murder case, it observed that there was no contravention of reaching an agreement under the customs and practices of the Wanga Sub-Tribe and hence adopted the terms of the Agreement resulting in the discharge of the Accused person with a view to bringing peace and healing to secure relationship.
13. In this case, the secondary victim wanted peace, to live in harmony with the Accused person and bring closure to this matter

as she understood his mental state. A perusal of the Agreement did not reveal any repugnancy to justice and morality, inconsistency with the Constitution or any written law or contravention of the Bill of Rights.

14. It was a valid and binding, social contract between two (2) parties that the court was obligated to acknowledge. Indeed, as the Accused persons' counsel stated, the State could not be more aggrieved than the secondary victims who no longer wished to proceed with the proceedings. The finding of this court would have been different if it was only the Accused person who wanted to settle the case as any settlement outside court had to be consensual.

15. Accordingly, the decision of this court is as follows;

a. The Reconciliation/Mediation Settlement Agreement of 14th November 2015 be and is hereby endorsed and adopted as an order of the court

b. The effect of this order is that the Accused person be and is hereby discharged unconditionally and free of any sanctions of this court.

c. The surety be and is hereby discharged from further obligations to ensure the attendance of the Accused person in court. The security to be returned to the surety forthwith.

d. File to be closed forthwith.

e. Orders accordingly.

DATED and **DELIVERED** at **VIHIGA** this **25th** day of **February** 2026

J. KAMAU
JUDGE

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