



**REPUBLIC OF KENYA**

**AT THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL REVISION NO. E102 OF 2021**

**REPUBLIC.....APPLICANT**

**VERSUS**

**JOSEPH MWAI KIIGE.....RESPONDENT**

**RULING**

1. By a letter dated 8<sup>th</sup> of June, 2021, the Office of the Director of Public Prosecutions requested the court to call for Shanzu Law Courts Criminal Case No. E008 of 2021 Republic V. Joseph Mwai Kiige for purposes of satisfying itself as to the correctness, legality or propriety of the Order given on 12<sup>th</sup> of January, 2021 by Honorable D. Odhiambo (RM).

2. The Prosecution was aggrieved by the Order discharging the Respondent under section 35 (1) of the Penal Code without making any Ruling whether the Plea of guilty as entered was equivocal, hence necessitating a trial on the facts or in need whether to simply the parties an opportunity to settle the dispute out of court.

3. It was argued that the trial Magistrate acted in haste and in disregard to the tenants of fairness and justice, particularly in the presence of the victim and failed to take into account the repercussions of the victim's proprietary claims by locking out any future prosecution of the accused.

4. The application for Revision was served on the Respondent but he did not respond. The lower court records were called for and it is shown that the charge of malicious damage to property was read over to the accused in the Kiswahili language and he pleaded guilty and was convicted on his own plea of guilt. Subsequently, facts were read to him and he said the facts were true and then he went on to give his mitigation in which he asked the court to visit the scene and see the site as the value was too high.

5. The trial court made an Order summoning the complainant to attend court on the 12<sup>th</sup> of January, 2021. When the complainant attended court, he informed the court that the issue was about a plot boundary and that the family of the accused were supposed to add to them some two (2) feet of their property for Ksh. 40, 000/= but they did not agree.

6. The mother of the accused was also given an audience and she said that the complainant had built on her plot and had not paid she was supposed to pay her.

7. Based on the presentations by the complainant and the mother of the accused, the trial Magistrate recorded:

**“This is a land dispute that should not be in this court. The parties can seek the appropriate remedies in a civil court. As such, the accused is hereby discharged under section 35 (1) of the Penal Code.”**

8. The principles to be applied in plea taking in all criminal cases were well enunciated in the locus classicus case of *Adan v. Republic [1973] EA 445* where the court held that:

**“(i) The charge and all the essential ingredients of the offence shall be explained to the accused in his language or in a language he understands.**

**(ii) The accused's own words should be recorded and if they are on admission, a plea of guilty should be recorded.**

**(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.**

*(iv) If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of pleas entered.*

*(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to the sentence together with the accused's reply should be recorded."*

9. The facts having been read to the accused person, the trial Magistrate ought to have entered a plea of guilty and convicted the accused according to the procedure provided for under section 207 (1) and (2) of the Criminal Procedure Code and as spelt out in the case of **Adan v. Republic (supra)**.

10. Subsequent to the accused responding to the facts in the affirmative, he proceeded to give his mitigation to the effect that

***"I ask the court to visit the scene and see the site. The value is too high."***

11. The mitigation by the accused person ought to have changed his plea of guilt entered before facts were read to a plea of not guilty for reasons that he disputed the value of the damaged property and he wanted the court to visit and verify.

12. Based on the accused person's mitigation, the court summoned the complainant and following presentations by the complainant and the mother of the accused, the accused was discharged under section 35 (1) of the Penal Code.

13. This court finds fault with the manner in which the discharge under section 35 (1) of the Penal Code was arrived at because it is not preceded by a plea of guilty and conviction after facts were read and it was entered on the basis that the land dispute should not have been filed before the trial Magistrate. Those sentiments in essence meant that the complainant could not seek for a remedy in the criminal justice system where damage to his property was occasioned. The conclusion by the trial Magistrate was not legal and the manner of taking plea was equivocal.

14. Shanzu Law Courts Criminal Case No. E008 of 2021 Republic V. Joseph Mwai Kiige should therefore be returned to the trial court for proper plea taking and trial if necessary. Mention on 16<sup>th</sup> November, 2021 before the trial court.

**Dated, signed and delivered in open court/online through MS. TEAMS on this 28<sup>th</sup> day of October, 2021**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of:**

Ogwel- Court Assistant

Mr. Mulamula for the Applicant

The Respondent – present in person

**Hon. Lady Justice Anne Ong'injo**

**Judge**