



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL REVISION CASE NO. 5 OF 2019

FREDRICK MUTHANJA MALUKI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. This file has been placed before me pursuant to the provisions of **Section 363** of the **Criminal Procedure Code**. By a letter dated the **15th** day of **February, 2019**, the Chief Magistrate, **Hon. S. Mbungu** acting in accordance with the provisions of **Section 363** of the **Criminal Procedure Code** seeks an order of revision.

2. The genesis of the matter is that the Accused was charged with the offence of **Assault** contrary to **Section 251** of the **Penal Code**. The case was heard and determined by **Hon. Boke, PM** who was transferred from this station. Having ceased to exercise jurisdiction in this station she wrote a Judgment, signed it and forwarded it for delivery by **Hon. J. M. Munguti PM** who succeeded her. In the meantime, the Accused absconded.

3. Subsequently a Warrant of Arrest was issued against him and after several mentions the learned Magistrate, **Hon. J. Munguti** delivered the Judgment and sentenced him in absentia on the **31st May, 2018**. He was sentenced to **two (2) years imprisonment**. It was ordered that the sentence commences after execution of the Warrant of Arrest.

4. In the month of **January, 2019** he was arrested and taken to the **Kitui G. K. Prison** but he could not be accepted as the Committal Warrant was dated **31st May, 2018**. Consequently the **OCS Mutito** who effected arrest caused the matter to be placed before the Court for directions.

5. When the Accused was produced in Court, he intimated that he had entered into an agreement with the Complainant dated **24th June, 2017** settling the matter. In the premises the learned Magistrate referred the matter to the High Court for directions.

6. My duty, therefore, is to satisfy myself of the legality or propriety of the order recorded and the regularity of the proceedings.

7. **Section 206** of the **Criminal Procedure Code** provides thus:

“(1) If, at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs.

(2) If the court convicts the accused person in his absence, it may set aside the conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits.

(3) A sentence passed under subsection (1) shall be deemed to commence from the date of apprehension, and the person effecting apprehension shall endorse the date thereof on the back of the warrant of commitment.

(4) If the accused person who has not appeared is charged with a felony, or if the court refrains from convicting the accused in his absence, the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court.”

The Accused was released on bail and he continued turning up for trial as required until he was put on his defence. His rights pursuant to **Section 211** of the **Criminal Procedure Code** were explained to him by the trial Court. He elected to give evidence on oath and pointed out

that he would call two (2) witnesses. On the date scheduled for defence hearing he testified but did not avail witnesses therefore the Court fixed a date for Judgment. On the stated date, the 6th day of **October, 2016** he did not turn up. This was in breach of the conditions of bail. Consequently a Warrant of Arrest was issued. On the 31st day of **May, 2018** Judgment was delivered in his absence. Accordingly he was sentenced to serve **two (2) years imprisonment**.

8. The Accused was charged with the offence of **Assault Causing Actual Bodily Harm** contrary to **Section 251** of the **Penal Code** which provides thus:

“Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.”

The procedure that was adopted by the trial Magistrate was therefore in accordance with the law as he had been charged with a misdemeanour.

9. It is on record that when the Accused was presented before **Hon. J. M. Munguti** he purported to mitigate. He told the Court that they had settled the case before the conviction and presented to the Court an agreement dated the 24th **June, 2017** written in Kikamba Language. I do note that the purported agreement was authored after the Judgment was delivered and the sentence meted out. In the case of **Uganda vs. Gulindwa Paul and Tumusiime HCT-00-AC-CM-005-2015** the Court stated thus:

“In my view, a Defendant of full age and sound mind, who is properly notified of his trial and chooses to absent himself, as a result violates his obligation to attend Court, deprives himself of the right to be present and when a criminal trial proceeds in his absence, he cannot come up and claim he had been denied his constitutional rights.”

10. **Article 159(2)(c)** of the **Constitution** provides thus:

“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);”

Section 176 of the **Criminal Procedure Code** provides as follows:

“In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.”

11. The Court has the discretion to promote reconciliation and especially in such a case but it depends at what point in time it is raised.

12. The Accused having decided to deliberately abscond cannot be heard to allege that the matter was settled. A perusal of the purported agreement also shows that it is written by one individual. Only names of the Accused and Complainant appear and some purported identity card numbers but it does not bear any signatures.

13. When the learned Magistrate sentenced the Accused and gave further directions of how the sentence would be served, he was *functus officio*, as his duty/authority had come to an end. He had passed a valid sentence therefore he could not have opened the case. The officer who apprehended the Accused was required to endorse on the back of the Warrant of Committal the date of arrest to facilitate the acceptance of the Accused by the prison authority.

14. In the premises I hereby quash and set aside the order of the Court dated the 12th day of **February, 2019** and direct that the file be placed before the **Hon. J. M. Munguti PM** for purposes of signing a warrant committing the Accused to prison to commence serving of the sentence passed on the 31st **May, 2018**.

15. It is so ordered.

Dated, Signed and Delivered at Kitui this 22nd day of February, 2019.

L. N. MUTENDE

JUDGE