



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

REVISION NO. 301 OF 2017

SILAS MWITHALII M'MAUTA.....APPLICANT

-VERSUS-

REPUBLIC..... RESPONDENT

RULING ON REVISION

1. SILAS MWITHALI M'MAUTA is the complainant in the following criminal cases in the Maua Chief Magistrate's Court:

(a) **Criminal Case No. 1292 of 2016**

Republic v. Bonface Mwiti Kiramburi (No. 1292/2016) and 4 Others;

(b) **Criminal Case No. 3016 of 2016**

Republic v. Tabitha Karimi Kanembu & 2 Others (3016/16);

(c) **Criminal Case No. 3817 of 2016**

Republic v. Martha Kagendo (No.3817/16)

(d) **Criminal Case No. 3169 of 2016**

Republic v. Peter Karimi Mbogo & 5 Others (No. 3169/16)

(e) **Criminal Case No. 1357 of 2016**

Republic v. Abraham Mwongera Mere (No. 1357/2016)

2. By his letter dated 10th of October, 2017, the applicant informed the court that his motor vehicle Registration No. KAV 642T was burnt on 26th April, 2016 by persons known to him. That after reporting the matter, the above five criminal cases were preferred against the various accused persons for malicious damage to property and attempted murder.

3. He complained that Criminal Case Nos. 3016/2016 and 1296/2016 were dismissed on 14th June, 2017 and 18th August, 2017 respectively under **section 202 of the Criminal Procedure Code** because of non-attendance. That he had not been bonded to attend court. That Criminal Case No. 3169 of 2016 was dismissed on 30th July, 2017 also for non- attendance. That on that day, t he was unwell, a fact the trial

court was made aware of but nevertheless dismissed that case. That there were three (3) witnesses in court on that day ready to testify.

4. He further complained that on 4th October, 2017, he saw the prosecutor and the accused emerge from the Magistrate's Chambers. That when he complained to the court, the trial court abused him. He therefore complained that the cases that were dismissed should not have been dismissed on the first hearing and that the court had shown bias. He therefore prayed that the cases be removed from Maua Courts and be tried either in Meru or Nkubu Law Courts.

5. Upon reading the complaint, this court called for the original records and the following is what the court found out:-

(a) Criminal Case No. 1292 of 2016

Charge of malicious damage to property

The plea was taken on 5th May, 2016. When the matter came up for hearing on 25th October, 2016, the prosecutor informed the court that he did not have the police files. He therefore applied for an adjournment which was granted. When the matter came up next for hearing on 18th July, 2017, the prosecutor once again told the court that he neither had the Police file nor witnesses. He requested for yet another adjournment. The defence opposed the application and the court agreed with the defence that the adjournment was being sought on the very same reasons as those 25th October, 2016. The prosecution thereupon closed its case and the court had no other choice but to terminate the proceedings under **section 202 of the Criminal Procedure Code (CPC)**.

(b) Criminal Case No. 3016 of 2016

Charge of Malicious damage to property

The plea was taken on 11th July, 2016. The matter came up for consolidation on 6th December, 2016. However, the prosecutor informed the court that he did not have details of the case that was to be consolidated with this case. Consolidation and possible hearing was therefore adjourned to 31st May, 2017. The case came up for hearing on 31st May, 2017 but the trial magistrate was on leave. It was then fixed for hearing on 14th June, 2017. On the said 14th June, 2017, the prosecutor told the court that he did not have the Police file and that the complainant was not in court. The defence prayed that the case be dismissed under **section 202 of the CPC**. The court thereby terminated the case under **section 202 of the CPC** for failure of the complainant to attend court and for reason that the Police file was not in court.

6. From the foregoing, it is clear that the court acted within the provisions of the law (**section 202**) to terminate the proceedings. The complainant should blame himself for failing to attend court and the Police for failing to avail the Police file. The court cannot be blamed for upholding the law.

7. It was contended that the cases were dismissed on the first hearing. That is not true. The cases had hitherto come up for hearing before the dates they were dismissed. In any event, the law presupposes that criminal cases do proceed for trial on the day they are first fixed for hearing unless there is good reason to be recorded. In the instant case, there was no reason whatsoever to grant any adjournment. The trial court did not therefore abuse its discretion.

8. As regards the other cases:-

(a) Criminal Case No. 3817 of 2016

Charge of malicious damage to property

The plea was taken on 15th April, 2016 and the hearing was fixed for 31st May, 2017. The matter came up

on 31st May, 2017 when the trial court was on leave. It was adjourned for mention on 14th June, 2017 and hearing on 3rd October, 2017. When the matter came up for hearing on 3rd October 2017, the trial court ordered that this matter be consolidated with **Criminal Case No. 1357 of 2017**. On 17th October, 2017, the consolidated charge sheet was not ready. No further action has been taken on this matter.

(b) **Criminal Case No. 3169 of 2017**

Charge of attempted murder

According to the charge sheet presented in court on 12th April, 2016, the accused were charged with the attempted murder of the complainant on 29th April, 2016 at Nkandone Village. The plea was taken on 12th October, 2016. On 2nd November, 2016, the case was consolidated with Maua Criminal Case No. 3206 of 2016. When the matter came up for hearing on 4th July, 2017, the prosecution was not ready as the head of prosecution, Meru County had called for the Police file to give directions. The matter was adjourned to 31st July, 2017. On that date, the prosecutor told the court as follows:

“It has been pending for hearing for some time. Complainant is not in Court. I have been instructed to proceed with the matter. I have the investigating officer in court who says complainant is not willing to come and testify and we pray the same to be withdrawn under section 87 (a) CPC.”

The court terminated the case under **section 202 of the CPC** as clearly **section 87 (a)** was inapplicable in the circumstances.

9. The offence against the applicant occurred on 29th February, 2016 at Nkandone Village. He indicated his unwillingness to proceed with the cases. How is the court to be faulted when it acted in accordance with the law? The court was not bound to accede to the request by the prosecution for the withdrawal for the case under **section 87 (a) of the CPC**. That section was clearly inapplicable when the complainant himself was not willing to proceed with the charges.

10. I note that Criminal Case Nos. 1296 of 2016 and 3016 of 2016. They were both dismissed for, inter alia, the complainant failing to attend court. Surely, the applicant can only blame himself not the court.

11. In Criminal Case No. 3169 of 2016 and 3206 of 2016 (consolidated), the offence was attempted murder of the applicant on 29th April, 2016 at Nkandone Village of Igembe North Sub-County. The case was dismissed because the applicant, through the prosecution, informed the court that he did not wish to attend court and testify. What was the court expected to do but to invoke its powers under the law and prevent abuse of court process.

12. As regards Criminal Case No. 3817 of 2016, this relates to malicious damage to motor vehicle Registration No. KAV 642T belonging to the applicant on 26th April, 2016 at Laare Division, Igembe North Sub-County. This case is still pending trial. An order was made on 17th October, 2017 that it be mentioned on 6th November, 2017 for consolidation with Criminal Case No. 1357 of 2017 which had already been terminated on 14th June, 2017. That was an order made in error.

13. The jurisdiction of this court under **section 362 of the Criminal Procedure Code** is to satisfy itself if the proceedings or order complained of is regular, legal or proper. That section provides:-

“The High court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

14. Having reviewed the entire record, I am satisfied that there was no irregularity or even abuse of

process on the part of the trial court. The blame squarely lies with the applicant. If he was never bonded as he alleges, he should pursue the office of the Director of Public Prosecution and the Police for explanation and not the trial Court. In the circumstances, I find no irregularity in the proceedings undertaken by the trial court.

15. Accordingly, I decline to review any of the orders made. Likewise, let Criminal Case No. 3817/2016 proceed before the trial court until conclusion. The original records are hereby ordered returned to the trial court. This ruling be served upon both the trial Court, the Chief Registrar of the Judiciary to whom the complaint was originally directed at, the Office of the Public Prosecutions and the applicant.

It is so ordered.

DATED and DELIVERED at Meru this 30th day of January, 2018.

A. MABEYA

JUDGE

30/01/2018