

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APP. NO. 540 OF 2018

DAVID NGUGI NGANGA.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. I have heard both parties on the application dated 17/09/2018. I have also read the original record of proceedings and more particularly to the submissions on the request to withdraw the case. The same was informed by the fact that the Applicant (accused) and the complainant in the trial had since reconciled.

2. In an affidavit sworn by the complainant on 20/03/2018, he averred that he had since been compensated by the accused and the two had reconciled. The prosecution supported this move by a brief dated 18/6/2018.

3. The accused (Applicant) faces two offences; one of grievous harm contrary to **Section 234** of the **Penal code** and malicious damage to property contrary to **Section 339(1)** of the **Penal code**.

4. The affidavit respecting reconciliation is sworn by one Nemwuel Hamisi Muturi. Both the Constitution and the Criminal Procedure Code encourages reconciliation (**Section 176 Criminal Procedure Code**) in cases of personal nature and alternative modes of dispute resolution (**Article 159(2)(c)**).

5. I am of the view that the learned trial magistrate in her ruling made on 14/8/2018 did not take into account this noble principle. Whether or not the accused may have absconded is not the issue. The fact is that he had reconciled with the complainant in count II and compensated him as well. He would then suffer double jeopardy if he were to be tried for the same offence he has restituted the complainant.

6. In that respect, I find the application merited. The learned trial magistrate occasioned an irregularity by not allowing the withdrawal of the case in respect of count I. To that extent, the same is set aside. I substitute it with an order that the learned trial magistrate shall allow the complainant in count I to take oath before her and reaffirm the content of his affidavit intending to withdraw the case. She shall then allow the withdrawal of count I under Section 204 of the Criminal Procedure Code.

7. I make no order as regards Count II as there is no evidence that the complainant therein had presented his/her intention to withdraw the case.

8. Mention on 14/11/2018 before the learned trial magistrate, Hon. Mutuku for compliance with this ruling.

DATED and DELIVERED this 31st day of October, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Njau for the Applicant*

2. *M/s Sigei for the Respondent.*