



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CRIMINAL APPEAL NO. 9 OF 2017**

**REPUBLIC ..... APPELLANT**

**VERSUS**

**BONIFACE NYONGESA ..... RESPONDENT**

*(From the original order in criminal case No. 2518 of 2015 of the Chief Magistrate's Court at Busia by R.M Washika Wachira – Senior Resident magistrate)*

**JUDGMENT**

**BONIFACE NYONGESA**, the respondent was charged with an offence of creating disturbance in a manner likely to cause a breach of the peace contrary to section 95(1) (b) of the Penal Code.

The particulars of the offence were that on 12<sup>th</sup> November 2015 at Agricultural and Livestock Office in Township location of Busia County, created disturbance in a manner likely to cause a breach of the peace by chasing **AKHONYA MUKABANE**, while armed with a machete.

The respondent pleaded not guilty and the matter was scheduled for hearing on 11<sup>th</sup> February 2016. On this date the matter did not proceed for the trial magistrate was on leave. It was therefore adjourned to 12<sup>th</sup> July 2016 for hearing.

On 6<sup>th</sup> June 2016 when the matter came up for mention, the defence counsel informed the court that they had agreed with the prosecution to bring the hearing forward to 14<sup>th</sup> June 2016. The prosecutor in court confirmed the same and the court changed the hearing date from 12<sup>th</sup> July 2016 to 14<sup>th</sup> June 2016.

When the matter came up for hearing on 14<sup>th</sup> June 2016, Kelwon, the learned state counsel informed the court that the complainant was not interested in the matter and that it could be withdrawn. The defence did not object.

The court made the following order:

***Matter withdrawn under section 202 CPC. on above reasons. Surety documents to be given back.***

This is the against which the state has appealed. Section 202 of the Criminal Procedure Code provides as follows:

***If, in a case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the court under arrest, then, if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the court shall thereupon acquit the accused, unless for some reason it thinks it proper to adjourn the hearing of the case until some other date, upon such terms as it thinks fit, in which event it may, pending the adjourned hearing, either admit the accused to bail or remand him to prison, or take security for his appearance as the court thinks fit.***

The court, other than the information that the complainant was not interested, was not furnished with any

evidence that he was notified on the change of the hearing date. Without evidence of such notification, then the learned trial magistrate ought to have demanded for more evidence to satisfy her that indeed the complainant was not interested. The complainant's interests were compromised and he suffered injustice.

From the foregoing, the order cannot be allowed to stay. I accordingly set it aside and order that the respondent be taken to Busia Chief Magistrate's Court for fresh plea taking before any competent magistrate other than Hon. Washika Wachira. The plea to be taken on 6<sup>th</sup> July 2017.

Orders accordingly.

**DELIVERED and SIGNED at BUSIA this 22<sup>nd</sup> day of June, 2017**

**KIARIE WAWERU KIARIE**

**JUDGE**