



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL REVISION CASE NO. 1 OF 2014

JOSEPH MBURIA NJERU.....APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

I called for this file (Embu Chief Magistrate's Criminal Case No. 22/2014) pursuant to the Provisions of Articles 165(6) & (7) of the Constitution 2010 and Section 362 of the Criminal Procedure Code. And having perused and examined the record and having heard from the learned State Counsel, I do find that the offender herein pleaded guilty to the charge of Malicious Damage to property contrary to Section 339(1) of the Penal Code. The facts were read to him in Kiambu language which he understands and he admitted the said facts. I therefore find that the plea was unequivocal and that the offender was properly convicted.

It is while mitigating that the offender mentioned to the Court that the complainant was his son. This had not been stated by the Prosecution. The learned trial Magistrate promptly called for a Probation Officer's Report before sentence. The report was availed on 22/01/2014 and this is what the learned trial Magistrate stated before sentence.

“I have read the report. The report is unsuitable for non-custodial sentence.”

Mr. Wanyonyi for the State has submitted that the report was scanty and was biased against the offender. I have taken time to read the report to satisfy myself of the unsuitability of the offender for placement on a non- custodial sentence. The reasons given by the Probation Officer are basically two viz;

- i. ***The offender was a repeat offender and has not reformed.***
- ii. ***The offender has no fixed abode. I have taken note of the fact that the Probation Officer prepared this report solely on the information he gathered from the offender. He did not carry out any independent investigation during the two (2) weeks period the offender was in remand Prison. All the contact offices and persons are in his report, yet he failed to contact them.***
- iii. ***There is no proof that the offender had previous convictions. Even the Probation Officer in his report alluded to that fact. Could he therefore be said to be a repeat offender without such proof? Even if the convictions were proved the Court had a duty to weigh and see if the said convictions related to the offence of malicious damage. The Probation Officer has clearly indicated in his report the location, sub-location, District plus the names of the chief and assistant chief of those areas where the offender comes from. He has given so much detail about the offender and his family. It is not clear how he came to the conclusion that the offender had no fixed abode. This is ridiculous and confirms that this report was indeed biased against this offender.***

My finding is that the learned trial Magistrate should not have relied on such a report to hand down a sentence of 18 months imprisonment to the offender. The offender and complainant are father and son. There appears to be a domestic problem between the parents. Sending the offender to Prison (unless necessary) will not solve this problem. The State does not support this sentence. I therefore set aside the sentence of 18 months imprisonment.

The State through Mr. Wanyonyi confirms that the damage to the bicycle was not very serious and that shs.1000/= would be sufficient for repairs.

The therefore substitute the sentence of 18 months imprisonment with a Discharge under Section 35(1) of the Penal Code on the following conditions;

- i. *The offender to repair the bicycle and hand it over to the complainant in a working condition within 30 days from today.*
- ii. *The offender to remain of good conduct for the next six (6) months. If any of these conditions is breached then the offender will be arrested and arraigned before this Court for further orders.*

DATED, SIGNED AND DELIVERED AT EMBU THIS 27TH DAY OF JANUARY 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

Mr. Wanyonyi for State

Accused

Njue – CC