



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Criminal Revision 46 of 2008

REPUBLICAPPLICANT

VERSUS

KADZO SARORESPONDENT

R U L I N G

The Town Clerk, Municipal Council of Malindi wrote a letter dated 17th June 2008 complaining about the manner in which Criminal Case No. 28 of 2008 was finalized. The file was placed before Mr. Ochenja SRM for plea on 27-2-2008 and the appellant entered a plea of NOT GUILTY. The case was then fixed for hearing on 8-4-08 but prosecutor indicated that he was not ready to proceed hearing was rescheduled to 11-6-08 and Mr. Kituku (RM), now took over the matter. However hearing did not proceed as accused was not in court on 11-6-08 and a warrant of arrest was issued and the case set for mention on 25-6-08. On 12-6-08 and a warrant of arrest was issued and the case set for mention on 25-6-08.

On 12-6-08, the accused appeared in court and her advocate Mr. Otara informed the court that accused was aged and extremely sick. The learned trial magistrate then made the following orders:

“Accused is acquitted unconditionally under Section 35(1) Penal Code”

The Town Clerk complains that at no moment in the proceedings is it indicated that the accused pleaded guilty to the charges for her to get the amnesty.

(2) Section 35(1) Penal Code is a conditional discharge and not an acquittal and that no conditions were imposed on the accused.

The applicants feel there has been a miscarriage of justice and pray that the orders by the learned trial magistrate be set aside upon the revision by this court.

It is true that at no point in the record is it shown that the accused entered a plea of guilty to warrant the court to proceed to pass sentence of whatever kind.

The record is that accused had entered a plea of not guilty and the matter was scheduled for hearing.

The correct procedure is that where an accused has pleaded not guilty, then the trial process must take effect by way of calling for evidence through witnesses, then if accused has a case to answer the defence case is heard, submissions made by counsel, then judgment is pronounced and if there is conviction then

sentence passed. In this instance the trial court seems to have acted *suo moto* - without any prompting at all, and upon hearing that accused was aged and sickly she was acquitted under Section 35(1) Penal Code.

Now the provisions of Section 35(1) Penal Code are as follows:

“where a court by or before which a person is convicted of an offence is of opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order under the Probation of Offences Act is not appropriate, the court may make an order discharging him absolutely ...”

What was said regarding the accused's physical condition were really mitigating factors to be considered before passing sentence, BUT sentence can only be meted out where one has either pleaded guilty to the charge and facts narrated and confirmed as correct or the due process of trial has taken place. Sentence, no matter how lenient cannot be meted out on an individual who has entered a plea of NOT GUILTY and has not gone through the entire trial process. To this extent then the learned trial magistrate misdirected himself and the complaint by Municipal Council of Malindi Town Clerk is valid.

I therefore makes orders to;

1. Set aside the sentence passed herein and order that this file be placed before the Senior Principal Magistrate Malindi for trial direction before a magistrate other than the one who handled the case previously. Summons should be issued to the accused to attend court on an appropriate date.
2. The matter be mentioned before the Senior Principal

Magistrate Malindi on 30th July 2008.

Delivered and dated this 30th day of July 2008 at Malindi.

H. A. Omondi

JUDGE