



**Republic v Amoth (Criminal Revision E103 of 2024)
[2025] KEHC 4507 (KLR) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4507 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL REVISION E103 OF 2024**

DK KEMEL, J

APRIL 8, 2025

BETWEEN

REPUBLIC APPLICANT

AND

JOHN JURA AMOTH RESPONDENT

RULING

1. Learned counsel for the Applicant has sought for revision of the lower court’s orders dated 25/11/2024. The request has been made through a letter dated 17/12/2024 wherein the learned counsel has raised complaints inter alia; that the trial court made an error when it discharged the Respondent under Section 35 of the Penal Code; that the trial court misused the discretion granted to it under Section 35 aforesaid when it ought to have made a different order in view of the fact that the Respondent had pleaded guilty to an offence of assault causing actual harm contrary to Section 251 of the Penal Code; that there was a miscarriage of justice since the offences of assault are rampant in the area warranting the court to sent out severe warning as a form of deterrence but not to condone it; that the sentence passed was illegal as the same did not reflect the gravity of the offence committed by the Respondent; that this court should invoke its revisionary powers under Section 364 of the Criminal Procedure Code and reverse the order and impose a more appropriate sentence.
2. Revisionary power of the High Court is granted is donated to the High Court under Article 165 (6) and (7) of the Constitution which provides as follows:
 - (6) The High Court has supervisory jurisdiction over the subordinate courts and over every person, body or authority exercising a judicial or quasi -judicial function but not a superior court.



- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person or authority referred to in clause (6) and may make orders or give any direction it considers appropriate to ensure the fair administration of justice.

Revisionary power is also donated to the High Court under Section 362 and 364 of the [Criminal Procedure Code](#) which are as follows:

362 (1) – 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.

364 – (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to its knowledge, the High Court may –

- a. In the case of a conviction, exercise a case of any of the powers conferred on it as a court of a court of Appeal by Section 354, 357 and 358, and may enhance the sentence;
 - b. In the case of any other order other than an order of acquittal, alter or reverse the order.
 - c. In proceedings under Section 203 or 296 (2) of the [Penal Code](#) the *Prevention of Terrorism Act*, the *Narcotic Drug and Psychotropic Substances (Control) Act*, the *Prevention of Organized Crimes Act*, the *Proceeds of Crime and Anti Money Laundering Act*, the *Sexual Offences Act* and the *Counter -Trafficking in Persons Act*, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.
- (2) No order under this Section shall be made to the prejudice of an accused person unless he had had an opportunity to being heard either personally or by an advocate in his own defence; provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
 - (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
 - (4) Nothing in the Section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.



- (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.
3. Being guided by the above provisions, it is necessary to reproduce the proceedings of the lower court which are now called into question. Indeed, the Respondent pleaded guilty to a charge of assault contrary to Section 251 of the *Penal Code* with the particulars being that on 18/7/2024 at around 2300 hrs at Chore village, East Asembo Location, North Ramba Sub Location in Rarieda Sub County within Siaya County assaulted Elias Ouma Opiyo causing him actual bodily harm. The facts were that on 18/7/2024 at 11.00 pm Chore village East Asembo Location complainant Elias Ouma Opiyo was heading home from his shamba when he was accosted by accused and his two sons who started assaulting him and that he got injured on the head, neck and lower limb. He reported at Ndori police station. He went to Akala Health Centre where he was treated. The treatment note that was issued by Akala Health Centre was produced as Exhibit 1 while the P3 form issued by police at Ndori was produced as Exhibit 2.
 4. Upon the Respondent pleading guilty to both the charge and the facts, the learned trial magistrate entered a plea of guilty upon the accused's unequivocal plea of guilty. The Respondent was duly convicted. The learned trial magistrate called for a presentence report which was duly availed by the Probation department. After receiving the mitigation and the presentence report, the learned trial magistrate ruled as follows: "I have considered the circumstances of the offence in the presentence report dated 25/11/2024; I have considered the character of the accused and the fact that the complainant was the aggressor; I hereby discharge absolutely accused person pursuant to Section 35 of the *Penal Code*; file closed."
 5. It is from the foregoing order of the learned trial magistrate that the Applicant was aggrieved and lodged the present revision.
 6. I have considered the revision aforesaid together with record and the provisions of the Constitution and *Criminal Procedure Code*. the issue for determination is whether the revision application has merit.
 7. it is noted that the Respondent had been charged with an offence of assault causing actual bodily harm contrary to Section 251 of the *Penal Code* which provides that any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanor and is liable to imprisonment for five years. The trial court called for a pre-sentence report which was duly availed and which recommended the Respondent to be placed under probation for a period of six months. The report further indicated that the Respondent acted in self defence after the complainant attacked him in his home at night. The report also indicated that the parties had an unresolved boundary dispute. The Respondent upon pleading guilty to the charge sought for leniency. The learned trial magistrate appears to have been persuaded by the sentiments of the probation officer but it seems she was carried away by the fact that the probation officer indicated that the Respondent had acted in self-defence. I find that it was erroneous on the part of the learned trial magistrate to have discharged the Respondent under Section 35 of the *Penal Code*. It is clear that the trial magistrate went into error when she made the following observation "having considered the character of the accused and the fact that the complainant was the aggressor.." yet the Respondent had pleaded to the charge. Indeed, the Respondent had the opportunity to qualify the charge by raising the issue that he had acted in self defence so as to call for a full trial in the matter. It is also clear that the Respondent having failed to raise such a defence, then the eventual conviction upon a plea of guilty should have attracted a sentence commensurate with his blameworthiness. Hence, the order made by the learned trial magistrate led to a miscarriage of justice in that the least that she could do was to place the Respondent under probation as proposed by the



probation officer. It is obvious that the learned trial magistrate failed to capture the sentiments of the complainant who sustained injuries and that no evidence whatsoever was presented to the court to the effect that the Respondent sustained any injuries while acting in self defence. The trial court in discharging the Respondent was akin to a slap on the wrist as it were. The unconditional discharge aforesaid did not reflect the gravity of the offence committed by the Respondent.

8. In view of the foregoing observations, it is my finding that the Applicant's revision dated 17/12/2024 has merit. The same is allowed. The order made by the learned trial magistrate dated 25/11/2024 discharging the Respondent under Section 35 of the [Penal Code](#) is hereby set aside and substituted with an order that the Respondent be and hereby ordered to serve a probationary sentence of six (6) months from the date hereof.

DATED AND DELIVERED AT SIAYA THIS 8TH DAY OF APRIL, 2025.

D. KEMEI

JUDGE

In the presence of:

Kofafor Applicant

N/A.....Respondent

John.....Court Assistant

