

No. 429/14

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL REVISION 341 OF 2014

AGNES NDUKU MUYUKUAPPLICANT

VERSUS

REPUBLICRESPONDENT

(Being a revision from the orders in Kangundo Senior Principal Magistrate's Court Criminal Case No. 449 of 2013 by Hon. Japhet Bii, RM on 3/10/14)

RULING

1. This matter has been placed before me pursuant to the provisions of **Section 363(2)** of the **Criminal Procedure Code**. **Hon. Mugambi, Senior Principal Magistrate in charge of Kangundo Law Courts** called for the file presided over by **Hon. Japhet Bii, Resident Magistrate**, a court lower in jurisdiction to him pursuant to the provisions of **Section 363(1)** of the **Criminal Procedure Code**. He perused the file and satisfied himself that the case was irregularly terminated under **Section 202** of the **Criminal Procedure Code**.

2. The gist of the matter was that the accused was charged with the offence of damaging property maliciously contrary to **Section 39(1)** of the **Penal Code**. He pleaded not guilty to the charge. The State presented its case by calling evidence of five (5) witnesses. The accused who had all along acted in person engaged services of an advocate. He sought to have witnesses who had testified re-called for further cross-examination but the trial magistrate dismissed his application. Consequently parties sought to reconcile.

3. The matter was mentioned thrice but no settlement was reached. The case was set for hearing on the **3/10/2014**.

4. On the material date an application was made by **Ms Muthee** learned State counsel to have the matter terminated under **Section 202** of the **Criminal Procedure Code**. The prayer sought was granted. The trial court remarked thus:-

“The case is hereby withdrawn under section 202 of the Criminal Procedure Code since the complainant never attended court. The accused is discharged”.

5. **Section 202** of the **Criminal Procedure Code** provides;-

“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”.

6. Consequences of non-appearance of a complainant who is duly notified of the hearing are stipulated.

The section envisages non-appearance at the outset of the hearing of the case. This is a case where a State Counsel in address to the court stated that the complainant had never appeared despite efforts made to trace him. The nature of the effort made was not disclosed. There was no evidence of the complainant having been notified of the case. It is also shocking that a prosecutor could make such an application instead of the defence considering the fact that the same State counsel closed the case on the **22/4/2014**.

7. This case was a case where the State had called a total of five (5) witnesses. The state closed its case. The matter was pending ruling. The magistrate was enjoined to determine whether the prosecution had established a *prima facie* case against the accused person in order to put him on his defence. Terminating the case under **Section 202** of the **Criminal Procedure Code** by the same magistrate was evidence of either failing to appreciate the law or being actuated by an ulterior motive. The order made was improper and must be corrected as mandated by **Sections 362** and **363** of the **Criminal Procedure Code**.

8. In the premises, I hereby quash and set aside the order dated **3rd October, 2014**. Summons requiring attendance and/or warrant of arrest shall issue against the accused to appear in court on the **17th November, 2014** for further hearing of the case.

9. It is so ordered.

DATED and **SIGNED** at **MACHAKOS** this **6TH** day of **NOVEMBER, 2014**.

L.N. MUTENDE

JUDGE