



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

**Criminal Appeal 268 of 2008**

MARY KISINGA MALUKI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

**JUDGEMENT**

The Appellant **MARY KISINGA MALUKI** had on 19<sup>th</sup> September 2008 been charged before the learned Senior Resident Magistrate Kwale Law Courts with the offence of **CONCEALING BIRTH OF A CHILD CONTRARY TO SECTION 227 OF THE PENAL CODE**. The Appellant pleaded guilty to the charge. She was thereafter sentenced to serve five (5) years imprisonment without the option of a fine. Being aggrieved by this sentence the Appellant filed this appeal.

**MR. ONSERIO** the learned State Counsel conceded this appeal for reasons that were quite apparent. I have myself perused the record from the lower court and I note that the learned trial magistrate made one fatal omission. The charges were read out to the Appellant in Kiswahili and she did plead guilty by stating

*"It is true"*

Thereafter as required by law and procedure the facts were also read out to the Appellant by the court prosecutor. The Appellant responded to those facts as follows –

*"The facts are correct"*

The prosecutor then proceeded to ask that the Appellant be treated as a first offender. Her mitigation was heard and sentence pronounced. At no time at all in the course of these proceedings did the learned trial magistrate ever **'convict'** the Appellant despite her plea of guilty. S. 207(2) of the Criminal Procedure Code provides

***"If the accused admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary [my emphasis]"***

The words of S. 207 are very clear and are couched in mandatory terms. The court **"shall"** convict the accused upon a plea of guilty. In this case the Appellant did plead guilty but no conviction was rendered at all. This is a fatal omission which makes the ensuing sentence null and void. One cannot be sentenced unless one has first been convicted. The trial magistrate omitted a crucial part of the criminal process. On this ground alone this appeal succeeds. I quash the Appellant's conviction and set aside the five (5) year sentence.

Mr. Onserio for the State did ask that the court order a re-trial in this matter. I note that the Appellant was convicted in September 2008. It is now July 2010. She has therefore served over 1½ years of what was an invalid sentence. To order a trial at this point would in my view be prejudicial to the Appellant. I have no doubt that she has spent enough time behind bars to make her see the error of her ways. As such I decline to order a re-trial. The Appellant is to be set at liberty forthwith unless she is otherwise lawfully held.

**Dated and Delivered in Mombasa this 12<sup>th</sup> day of July 2010.**

Mr. Ondari for State

Appellant in person

**M. ODERO**

**JUDGE**

**12/07/2010**