



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISII

Criminal Appeal 50 of 2008

REPUBLIC APPELLANT

VERSUS

BERNARD REUTA MASAKE RESPONDENT

JUDGMENT:

On 14th April, 2008, the respondent was charged with manslaughter contrary to Section 202 of the Penal Code. The particulars of the offence were that between 21st October, 2007 and 3rd November, 2007 at Olorbosoito area in Trans Mara District within Rift Valley Province, the respondent unlawfully killed Damaris Sempeiyo Kipteng, hereinafter referred to as “the deceased.”

The respondent pleaded guilty to the said charge. He was convicted on his own plea of guilty and sentenced to a fine of Kshs. 12,000/= in default one year imprisonment. The respondent paid the fine.

The Attorney-General was dissatisfied with the lenient sentence that was passed by the trial court.

He filed an appeal, saying that the facts of the case as given to the trial court after the plea of guilty was taken were incorrect and denied the court an opportunity to pass an appropriate sentence.

The prosecutor told the court that on 21st October, 2006 the deceased, who was aged about 16 years, left their home for church and was not seen alive thereafter. On 3rd November, 2006 her body was found in a maize plantation. A post mortem ruled out suicide and indicated that violence may have been used against the deceased. Investigations led to the respondent and he was arrested.

In mitigation, the respondent said that the deceased was epileptic and she died when they were making love. He said she was suffocated. The court was not convinced about those facts and called upon the prosecutor to give more detailed facts so that the trial magistrate could make up her mind in sentencing the respondent.

After a short while, the prosecutor told the court that the deceased visited the respondent as her boyfriend. The respondent had another girlfriend who had differed with the deceased. The deceased knew about that other relationship. She got furious and threatened to take her life. She cried out and screamed aloud.

The respondent tried to stop her from screaming by placing his hand over her mouth. The deceased then suffered an epileptic bout and died. When the respondent discovered that the deceased had died, he

carried her body to a plantation and dumped the body there. Later he wrote a disguised note regarding the whereabouts of the body and left it on the road side.

Mr. Kemo, Senior Principal Prosecution counsel, submitted that he had perused the police file relating to the deceased's death and realized that the facts were not accurately presented to the trial court. He swore an affidavit to which he annexed statements recorded by several people including the respondent.

Mr. Sagwe for the respondent opposed the appeal. He submitted that the learned trial magistrate exercised her discretion properly in sentencing the respondent. He however did not comment on Mr. Kemo's affidavit and the annexures thereto.

Having carefully considered the submissions on record and in particular the statements that are annexed to Mr. Kemo's affidavit, I am satisfied that the manner in which the plea was taken occasioned a miscarriage of justice. The prosecutor did not give the accurate facts to the trial court. A trial court can only pass appropriate sentence if it is seized of all the facts pertaining to commission of an offence by an accused person who has pleaded guilty.

In the circumstances, I allow the appeal, quash the conviction and set aside the sentence that was passed by the trial court at Ogembo Senior Resident Magistrate's Court. I direct that the respondent be re-tried before any magistrate with competent jurisdiction other than J.D. Kwena, SRM.

DATED, SIGNED AND DELIVERED AT KISII THIS 30TH DAY OF MARCH, 2009.

D. MUSINGA

JUDGE.

Judgment delivered in open court in the presence of:

Mobisa – cc

Mr. Kemo for the State

Mr. Sagwe for the Respondent

D. MUSINGA

JUDGE.