



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Criminal Case 299 of 2003

REPUBLIC

VERSUS

SERAH WAMBUA MUINDI ACCUSED

RULING

1. Before me is a Notice of Motion dated 19/4/2007 and it is expressed to be brought under the inherent powers of the court. The Applicant seeks orders that her trial, conviction and sentence for the offence of manslaughter be declared a nullity *ab initio* and that her conviction be quashed and the 12 year sentence imposed be set aside.
2. I have read the Supporting Affidavit and the undisputed facts leading to the filing of the Application are that sometime in 2003, the Applicant was committed to Lang'ata Women's Prison to serve a 12 year sentence for the offence of manslaughter. She lodged an appeal in this court on 7/11/2003 being **H.C.Cr. Appeal No.299/2003** and I deem it appropriate to set out the grounds of appeal which are;
 1. "I pleaded guilty at trial.
 2. That I am a first offender.
 3. That I committed this offence under extreme pressure and stress.
 4. That my husband had abandoned me with my (7) seven children and had gone to live with the deceased Joyce Munyili Kieti.
 5. That on the night preceding that date of the offence I had slept hungry with the children and the youngest child was seriously sick.
 6. That this child eventually died of the sickness while I was in custody.
 7. That on the following morning I decided to go and seek my husband in the deceased home so that he would assist me with the funds for food and for hospital.
 8. That when I was going to the deceased home I had not carried any weapon.
 9. That on arrival at the deceased homestead, the woman saw me and she entered her kitchen and came out with a panga threatening me.
 10. That when I saw the panga in her hands I sensed danger and that's when I ran for my dear life.
 11. That the deceased ran after me and on the way she fell down.

12. That I turned back and saw her down and the panga had left her arm and was a few paces away.
13. That after cutting her leg to immobilize her I went back towards her boma and on the way I met my husband and another woman and I informed them what I had done.
14. That they got hold of my arm and I went and took them where the woman lay.
15. That together with my husband I took the measures of taking her to hospital.
16. That it was not the first time I had gone to the deceased homestead to collect money for the family upkeep from my husband who would give me the necessary assistance and I would go home leaving him there.
17. That I feel depressed because I had no intention of hurting the deceased whatsoever.
18. That due to the long period my husband was away from home, the children were accustomed to me and my absence will affect them very much since I am the parent that they are more attached to.
19. That on commission of the offence, I was provoked.”

3. I should pause here and note that although the Applicant filed the Appeal in person, she is presently represented by an advocate and I do not see that any attempt has been made to file any other grounds of appeal or to change/amend those already on record.

4. Be that as it may, the Applicant now complains that since filing her Appeal, the original record of the subordinate court has never been availed to her and in the event the court has only one option and that is to declare the prior trial a nullity and order her release.

5. I have taken into account the submissions made by the advocate for the Applicant and the response by learned Senior Principal State Counsel. I note also that on 12/2/2009 I ordered the Deputy Registrar of this court to state in writing why Machakos CM’S Court Criminal Case number 2816/2003 cannot be traced. In a letter dated 17/3/2009, the Deputy Registrar wrote and stated as follows:-

“RE: HIGH COURT CRIMINAL CASE NO. 299 OF 2003 SERAH KAMBUA MUINDI VERSUS REPUBLIC

My Lordship, kindly note that the lower court file No.Cr.3816/03 not yet traced. The criminal registry staff need more time.”

6. As of today, the original record has not been traced and the question is; for that reason alone, should the Applicant be granted the orders she seeks? In our system which is wanting in terms of record keeping, the situation is not unique and whereas sometimes court files disappear because of deliberate acts of saboteurs, again sometimes they are genuinely misplaced. Our Court of Appeal has had occasion to deliberate on the matter in the case of Joseph Maina Kariuki vs R. Cr. Appeal Nos.53 and 105/2004. In that case the Appellant had been convicted and sentenced to death by the subordinate court on a charge of robbery with violence contrary to Section 296 (2) of the Penal Code. When he appealed to the High Court, the conviction and sentence were upheld and he again filed an appeal to the Court of Appeal and that is where things went wrong because the Court of Appeal “in short ...(could) not hear any purported appeal from the High Court because there (was) absolutely no record upon which it (could) proceed.” The court having looked at the unique circumstances in that case decided that the Appellant was not entitled to orders of release. The court instead ordered as follows:-

“We accordingly reject his claim that we should quash his conviction and set him at liberty. The relevant authorities i.e. the various court registries, the police and the Attorney-General must continue to look for the documents. In the meantime, the Appellant’s appeal must continue to pend while the documents are being searched for. We so order.”

7. Faced with a similar situation in John Karanja Wainaina vs R Cr. Appeal No.61/1993 (unreported); the Court of Appeal stated thus;

“In such a situation as this, the court must try to hold the scales of justice and in doing so must consider all the circumstances under which the loss has occurred. Who occasioned the loss of all the files? Should he benefit from his own mischief and illegality if he is? In the final analysis, the paramount consideration must be whether the order proposed to be made is the one which serves the best interest of justice. An acquittal should not follow as a matter of course where a file has disappeared. After all a person, like the appellant has lost the benefit of the presumption of

innocence given to him by section 72 (2) (a) of the Constitution, he having been convicted by a competent court and on appeal the burden is on him to show that the court which convicted him did so in error. Thus, the loss of the files and proceedings may deprive him of ability to discharge that burden, but it by no means follows that he must of necessity be treated as innocent and automatically acquitted. The interest of justice as a whole must be considered.”

8. A clear reading of the two decisions would lead me to conclude that each case must be looked at in its circumstances and whatever orders this court should make, must be such as to serve the wider interests of justice and not merely the right of the Applicant to the processes enacted by law including that right to an appeal. That being so, in the present case, I note that the Applicant admits the offence of manslaughter and only pleads for leniency on sentence. She is not challenging conviction and that is an important consideration taking into account what the Court of Appeal said in Wainana (Supra).

9. In the letter from the Deputy Registrar, more time was sought to establish what happened to the original record and the Applicant having lost the presumption of innocence; she on Appeal having gone ahead to admit the offence and prays for leniency, the circumstances cannot in all fairness entitle her to a release. The wider interests of justice would not be served and encouragement would be given to other parties to abuse the many loopholes clearly apparent in our record-keeping system.

10. In the end, I will decline to grant the orders sought, will order the Deputy Registrar to seek assistance from relevant bodies in tracing the original trial record and in the meantime the Appeal will be mentioned before this court periodically to get updates and in due course this court will determine how to proceed depending on future events.

11. The Application is dismissed for all the above reasons.

12. Orders accordingly.

Dated and delivered at Machakos this 16th day of June 2009.

ISAAC LENAOLA

JUDGE

In presence of: Applicant present

N/A for Republic

ISAAC LENAOLA

JUDGE