



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL REVISION CASE NO. 459 OF 2007**

**FELISTA WANJIRU KONGI.....APPLICANT**

**(Mrs. Matheri Ikere)**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING ON REVISION**

*Felista Wanjiru Kongi* was charged, before Senior Principal Magistrate *Mr. Kiarie*, on 27<sup>th</sup> February, 2007 in the Kibera Law Courts Criminal Case No.1461 of 2007 as follows:

***FELISTA WANJIRU KONGI***: on the 20<sup>th</sup> day of February, 2007 at Athi River Estate in Machakos District of Eastern Province, knowing that one ***Simon Matheri Ikere*** had committed robberies within Kiambu District and Nairobi Area, received and assisted the said ***Simon Matheri Ikere*** in order to enable him to escape punishment.”

It is recorded in the trial Court proceedings that “the substance of the charge and every element thereof has been stated by the Court to the accused person, in the language that she understands”, and her plea thereto is recorded as follows:

“It is true, I concealed ***Simon Matheri Ikere***.”

With that plea of “guilty” the prosecutor, ***Chief Inspector of Police Ngata*** went on to set out the facts relating to the offence charged. He said as follows:

“***Simon Matheri Ikere*** was being sought by Police for several offences of robbery and murder. The Police announced the name through the media and called on members of the public to inform the Police about it. On 20<sup>th</sup> February, 2007 Police officers received information that he had been seen at Athi River. They went to one house where they were directed and found him. He was staying with the accused who claimed to be his wife. When he was found, a shoot-out with Police officers ensued and he was shot dead. The accused claimed to be ***Matheri’s*** wife. After investigations it was established that she failed to report to the Police the whereabouts of ***Matheri***. She was charged with the offence.”

The learned Magistrate, in preparation for the meting out of sentence, called for a Probation Officer’s report on the accused. When the matter came up for receiving the said report, on 13<sup>th</sup> March, 2007 the

accused was absent, apparently, having been hospitalised. At the scheduled mention of 14<sup>th</sup> March, 2007 the Probation report was not yet ready, and the accused was remanded in custody. At the mention of 19<sup>th</sup> March, 2007 the Probation Officer sought orders to enable her to access the accused who was hospitalised at Kenyatta National Hospital.

**Ms. Pamela Alambo**, the Probation Officer, later prepared a report which gave certain details as follows: accused was 31 years old; her home was in Ngatho Village, Gituambu Sub-Location, Mukuyu Location, Thika District. The report recorded **Felista Wanjiru Kongi's** family and personal background, marital status, and related matters, and thus recommended:

“...the middle-aged woman before the Court hails from a humble background free from criminal inclinations. She dropped out of school at an early stage to subsidise the meagre family resources, and in the process got involved in a socialisation which eventually led to a maladjusted person who easily got lured into naïve relationships to pursue her perceived [ends of] self-actualisation. She regrets the circumstances that led to her present predicament. She further regrets her relationship with a wanted criminal which has aggravated her socio-economic and emotional status. She pleads with this honourable Court for leniency and [for] a non-custodial sentence, being the only remaining parent to her four children, one [of them being] directly in need of her constant attention.”

On 27<sup>th</sup> March, 2007 the learned Magistrate dispensed sentence, committing the accused to a two-year probation term.

This matter thereafter came to the attention of the Federation of Women Lawyers-Kenya (FIDA), and after carefully considering the criminal law pertaining to spousal relationships, this women's advocacy organization became convinced that the conviction recorded stood in contradiction to the written law. FIDA wrote a petition to the Chief Justice, dated 28<sup>th</sup> February, 2007 and asked for a review of the judgement of the Senior Principal Magistrate's Court.

By virtue of s.362 of the Criminal Procedure Code (Cap.75, Laws of Kenya), the High Court has a supervisory jurisdiction over the lower Courts, and it 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.”

The irregularity perceived in the trial of **Felista Wanjiru Kongi** was this: she had been charged with the offence of being an *accessory after the fact*, a term which is thus defined in s.396(1) of the Penal Code (Cap.63, Laws of Kenya):

“A person who receives or assists another who is, to his knowledge, guilty of an offence, in order to enable him to escape punishment, is said to become an accessory after the fact to the offence.”

Was the accused an accessory after the fact to such offence as **Simon Matheri Ikere** may have committed?

This, precisely, is the point to be determined by this Court, as a matter coming within the High Court's *revision* jurisdiction.

In most cases, a person who knows that an accused person has committed an offence but accords succour to, or facilitates the escape of such a person, would clearly be an accessory after the fact, and would be liable to be arraigned in Court, by virtue of s.396 of the Penal Code.

There are, however, exceptions. The special relationship of wife-and-husband, which accords the two partners an inherent obligation of communion and consorting, dictates that even if one of the couple may have run afoul of the law in one respect or another, he or she still remains a consort to the other, and so,

neither of them is to be perceived as harbouring an offender and so is liable to prosecution as an accomplice, or an accessory after the fact.

In specific terms, and especially with regard to the position of a wife, s.396(2) thus provides:

**“a wife does not become an accessory after the fact to an offence of which her husband is guilty by receiving or assisting him in order to enable him to escape punishment; or by receiving or assisting in her husband’s presence and by his authority another person who is guilty of an offence in the commission of which her husband has taken part, in order to enable that other person to escape punishment; nor does a husband become an accessory after the fact to an offence of which his wife is guilty by receiving or assisting her in order to enable her to escape punishment.”**

The design and intent of s.396(2) of the Penal Code are clear and unmistakable. There is no evidence on record that *Felista Wanjiru Kongi* was not living with *Simon Matheri Ikere* as a wife; and this Court must, in the circumstances, take the two to have been wife-and- husband. And from this position, it follows that the accused could not lawfully have been charged with the offence of being an accessory after the fact to an offence such as may have been committed, as claimed, by her husband.

The charge against the accused, therefore, was improperly brought, quite contrary to the specific provision of the statute law. It follows, therefore, that the trial itself was not in accordance with the law.

This Court, in the exercise of its revision jurisdiction, now makes orders as follows:

- (1) The proceedings conducted before the Senior Principal Magistrate at the Kibera Chief Magistrate’s Court, in Criminal Case No. 1461 of 2007 are hereby quashed and declared null and void.
- (2) The conviction entered by the trial Court on 27<sup>th</sup> February, 2007 is set aside.
- (3) The sentence meted out against the accused on 27<sup>th</sup> February, 2007 is set aside.
- (4) The Deputy Registrar shall ensure the orders herein are served upon the Hon. The Attorney-General, and upon the accused in the original proceedings.

***Orders accordingly.***

**DATED and DELIVERED at Nairobi this 11<sup>th</sup> day of June,2007.**

**J.B. OJWANG**

**JUDGE**