REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 155 of 2005

(From the original conviction and sentence in criminal case No. 2968 of 2003 of the Senior Resident Magistrate's Court at Nairobi-F. Nyakundi SRM)

JEOL WILBERFORCE OBUNI ……..…. APPELLANT
VERSUS
REPUBLIC ……..…… RESPONDENT

JUDGMENT

After a full trial before F. Nyakundi (Mrs) SRM, ***MR. JOEL WILBERFORCE OMBUNI,*** hereinafter referred to as the appellant was convicted of the charge of manslaughter contrary to Section 202 as read together with Section 205 of the penal code. He was, upon conviction as aforesaid; sentence to five (5) years imprisonment. The charge stated in its particulars that on 24th February, 2003 at Luanda Clinic, Huruma Estate in Nairobi within the Nairobi area unlawfully killed Margaret Wanjiku Wanyoike, "***the deceased"*** hereinafter.

The facts of the case as would appear from the recorded evidence to be was that on 14th February, 2003, Jacinta Muthoni (P.W.1) and sister to the deceased received information that she was required at a clinic in Huruma Estate, Nairobi where the deceased was. She proceeded there and on arrival she met the appellant. She inquired about her sister from the appellant who informed her that the sister had come to him seeking treatment. His attempts to treat her failed and he had recommended that she be transferred to another hospital. He pointed out to her where the deceased was lying on a couch. When P.W.1 touched her, she realized that she was dead and informed the appellant. P.W.1 then proceeded to the police station and filed a report. Accompanied by the police officers, they came back to the scene and arrested the appellant. They also removed the body of the deceased. After the post mortem, the body was released for burial.

P.W.2 was among the officers who visited the scene and had the appellant arrested. According to this witness, the appellant was the proprietor of the clinic where the deceased's body was found. On interrogating the appellant, he stated that he had received the deceased in his clinic on 23rd February, 2003 at about 9.00 a.m. She was seeking medical assistance for an incomplete abortion carried out on her elsewhere at Kawangaware. That the appellant tried to assist her but the woman passed away as he was attending to her. The appellant then let them to a room in his clinic where they found the body of the deceased which had blood stains in its private parts. P.W.2 called scenes of crime personnel and one corporal Mwangi came and took photographs of the scene. The appellant was thereafter arrested and subsequently charged.

Put on his defence, the appellant elected to give an unsworn statement of defence and called no witnesses. He stated that on 23rd February, 2003 at 9.00 a.m. while in his clinic "***Luanda Clinic"*** he received a patient by the name Caroline Wanjiku who gave a history of lower abdominal pains and bleeding from her private parts. She gave a history of attempted abortion elsewhere. As she was weak,

the appellant administered first aid to the said Caroline Wanjiku who turned out to be the deceased. The patient started to respond to the first aid and had sufficiently recovered by 1.00 p.m. Subsequently thereto however, the condition of the deceased changed. She started fainting and eventually passed on at about 4.30 p.m. The appellant called Muthaiga Police station and reported the incident and was told that an officer will be send. It was not until the following day at 1.00 p.m. that 3 officers came, collected the body and had him arrested and subsequently charged. He denied responsibility for the death of the deceased.

The learned Magistrate was not convinced by the appellant's story. In convicting the appellant, the learned magistrate delivered herself thus:-

"……***Having said so, and given the condition of the deceased when she walked into Luanda Clinic at 9 a.m. on 23.2.2003 the accused who has admitted his only qualifications are those of a laboratory technologist decided to admit her nevertheless and gave her what he has termed "first aid" which continued from the 23.2.2003 at 9.00 a.m. up to 24.2.2004 at 5.30 a.m. When she allegedly passed away. The deceased passed away while in the hands of the deceased (sic) person. The accused person decided to detain the deceased who was in a very poor state medically, regardless of his limitations both in expertise and facilities. The action by the accused would amount to willful and deliberate omission to summon medical aid or have the deceased transferred to a hospital with better facilities that would have attended to the deceased and probably served her life …… The failure by the accused to make any effort in regard to the referral amounts to a breach of that duty of care, and actually amounts to unlawful and dangerous act, for which the accused is liable for the consequences of his omission. The accused by his negligence contributed to the death of the deceased and is thus responsible…."***

The appellant was convicted and sentenced on that basis.

The appellant was aggrieved by the conviction and sentence and hence lodged the instant appeal.

In his petition of appeal, the appellant faults the learned magistrate for convicting him on evidence that was not corroborated, that vital and crucial witnesses were never called to testify, that the offence of manslaughter was not proved and that the learned magistrate failed to resolve in favour of the appellant, the contradiction and doubts in the prosecution case.

When the appeal came up for hearing, the appellant tendered written submissions in support of his appeal. I have carefully considered the said written submissions in the course of writing this judgment.

Miss Gateru, learned state Counsel appeared for State and opposed the appeal. Counsel submitted that the prosecution proved its case against the appellant to the required standard. That the appellant was a laboratory technologist and did not have the necessary expertise to treat the deceased. The appellant should have made the necessary arrangements to transfer the deceased to another hospital. His failure to do so led to the death of the deceased. Accordingly, the appellant was guilty as charged.

As I consider the submissions by the appellant as well as the learned State Counsel, it must be remembered that as this is a first appeal I am are duty bound to examine and reevaluate the evidence on record to reach my own conclusion in the matter, always remembering that I had no advantage, as the trial Court did, of seeing and hearing the witnesses – see ***OKENO –VS- REPUBLIC (1972) E.A. 32.***

It is also an established principle that an appellate court will not normally interfere with a finding of fact by the trial Court, whether in a civil or criminal case, unless it is based on no evidence, or on misapprehension of the evidence, or the trial Court is shown demonstrably to have acted on wrong principles on reaching the findings it did. See ***CHEMAGONG –VS- REPUBLIC (1984) KLR 611.***

The offence of manslaughter is pegged on unlawful act or omission that results in the death of another person. Consequently for a conviction to result, the prosecution must prove that there was a death of a person and that death resulted from unlawful act or omission of the accused person. Was the prosecution

able to discharge this onerous task in the circumstances of this case? I do not think so. First, the death of the deceased was not established. No post mortem report was tendered in evidence as a prove that somebody died. In the absence of such evidence, much as circumstances would seem to suggest that indeed there was death, the Court should not have found for the prosecution on the issue of death. This is not a matter that can be presumed. Death must be proved by hard evidence. Unfortunately this was not the case here. I note that Dr. Wasike who allegedly conducted the post mortem had been lined up to testify. However she failed to appear on the day appointed for her to testify. Consequently the post mortem report was never introduced in evidence. So that even if the deceased passed on or not is purely a matter of conjecture. Further the post mortem would have probably shade light on the cause of death. In the absence of the opinion of the pathologist on the cause of death, it cannot be assumed as the trial court did that the course of death was a botched up abortion. The deceased could have died as a result of any other natural causes and not necessarily due to a failed abortion. Similarly the trial Court was of the view that because, the appellant was a laboratory technologist, he was ill-equipped to deal the emergency that the deceased presented when she came to the clinic. First and foremost, there was no evidence that the appellant because of his qualifications was least qualified to attend to the deceased. The issue of the appellant's qualifications was not canvassed during the trial at all. It would appear that the Court merely assumed that because the appellant was a laboratory technologist he could not manage the condition of the deceased. It was not the duty of the trial Court to make such supposition unaided with any scintilla of evidence. In the case of ***BURUNYI & ANOR –VS- UGANDA (1968) E.A. 123.*** It was held that**:**

"…. It is not the duty of the court to stage manage cases for the prosecution; nor is it the duty of the court to endeavour to make a case against an accused person where there is none. In a criminal case the court cannot enter into the arena. The duty of the court is to hold the scale to see that justice is done according to law on the evidence before it……"

Unfortunately, the trial court in reaching its decision did attempt to stage manage the case for the prosecution and indeed entered the arena of conflict. It was not open in the absence of any evidence for the court to hold that the appellant was negligent in not transferring the deceased to a better hospital. The appellant stated in his evidence that he attended to the deceased who responded to the initial treatment and or first aid very well, before her condition degenerated, got worse and she eventually passed on. This defence by the appellant was not challenged at all by the prosecution. So on what basis did the trial court reach the conclusion that the appellant should instead have referred the deceased to a better medical facility. None whatsoever in my view. In any event, the court was not informed whether the deceased was financially enabled to have met the financial demands of such better medical facility. If the deceased did not have any money on her, how then was the appellant expected to refer her to a better medical facility, and who would have accompanied her. These are the kind of issues that should have informed the learned magistrate in her decision.

Having made a very careful evaluation of the record in this case, I have a strong suspicion that the appellant may have in one way or another caused the death of the deceased. However, this is a mere suspicion. As stated in *the* ***BURUNYI CASE (SUPRA)***

"…..**But *suspicion upon suspicion must remain suspicion…"***

If indeed the appellant was involved in the botched up abortion, could the police officers who came to the scene not have been able to recover any instruments that the appellant could have used in the said abortion?

In all the circumstances of the case I do not think that the case against the appellant was proved beyond reasonable doubt as expected of the prosecution. It is a heavy onus which unfortunately the prosecution was unable to discharge in this case. This appeal is therefore allowed; conviction and sentence quashed. The appellant may be released forthwith unless he is otherwise held for other lawful purposes.

Dated at Nairobi this 25th day of September, 2006

……..

MAKHANIDA

JUDGE