



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

APPELLATE SIDE

CRIMINAL APPEAL NO. 414 OF 2002

(From Original Conviction (s) and Sentence (s) in Criminal Case No. 9041 of 2002 of the Snr. Principal Magistrate’s Court at Kibera)

FAITH MWENDE MUNILU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO 411 OF 2002

(From original conviction and sentence in criminal case no. 9041 of 2000

of the senior Principal Magistrate’s court at Kibera (W. Karanja (Mrs)

MAGDALENE ODUOR OWUOR alias

KAMAMA.....APPELLANT

VERSUS

REPUBLIC.....

RESPONDENT

J U D G M E N T

These appeals are consolidated. The two appellants Magdalene Owuor Oduor alias Kamama and Faith Mwende Munilu were jointly charged with three counts of manslaughter c/s 205 of the Penal Code.

After a full trial, each of the two appellants was convicted and sentenced to 4(four) years imprisonment on each of the three counts. The sentences were ordered to run concurrently. Being aggrieved by the said conviction and sentence they appealed.

I must observe from the outset that section 205 of the penal code only provides for the penalty for the offence of manslaughter. It is Section 202 of the code that provides for the offence. And so, the charge should have read manslaughter contrary to section 202 as read with section 205 of the Penal Code. I note however that, the appellants were represented by counsel from the commencement of the proceedings in the lower court. This omission as not made an issue and I believe no prejudice was occasioned as a result.

Be that as it may,when the appeals came up for hearing and the learned counsels for the appellants made his submissions, the learned counsel for the Republic conceded the same. I have also made an

independent evaluation of the evidence on record and, with respect, agree that, the convictions were not well founded on the evidence adduced.

There were three deceased persons, each mentioned in the respective three counts. The appellants were alleged to have prepared an illicit brew which the deceased are said to have consumed leading to their deaths. One inspector Karisa Maitha did not recover any brew from the appellants and no exhibit was produced to that effect.

Further to the foregoing, the evidence of dr. Alex Kirasi Olumbe (pw11) and the Government analyst were instructive.

The bodies of the deceased were John Lumumba in count one, Wamae Muriithi in count two and Peter Githua Njoroge in count three, The bodies identified to Dr. Olumbe were peter Githua Njoroge which tallied with count three, the others were Murithi James Kimeu and Stephen Wambua. How could the appellants be convicted of killing people not named in the charge? Even where the body was correctly identified that is count three, it was not established where it was recovered from. The evidence of the brother pw5 was not of much help as he only said he was called and told his brother had died. Significantly, the body was not found in the premises of the two appellants.

There was evidence that the body of John Lumumba named in count one, was found in the house of Magdalene Owuor, one of the appellants herein. However, there was no evidence that he was taking the alleged brew in that house. The court is only left with an inference which is not sufficient proof of an offence as serious as the one the appellants faced. Above all, no post mortem examination was conducted on the body of Lumumba. The samples received by the Government analyst, Pw10, did not indicate from which body they were obtained.

The judgment of the learned trial magistrate only mentioned the deceased Lumumba and was silent on the other deceased in counts two and three. That notwithstanding, the appellants were convicted of those two counts.

It is clear from the framing of the charge, the presentation of evidence and the flow of the case that, there was poor police investigation. This led to a miscarriage of justice. The convictions were not warranted. Accordingly, these appeals are allowed, convictions quashed and sentences set aside. The appellants shall be set free forthwith unless otherwise lawfully held.

Orders accordingly.

Dated and delivered at Nairobi this 20th day of June, 2002

MBOGHOLI MSAGHA

JUDGE

Mr Rumba Kinuthia for appellants

Mr Okello for the republic.

MBOGHOLI MSAGHA

JUDGE

20/6/2002