



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CRIMINAL APPEAL NO. 35 OF 2018**

**SINGH BOSIRE NYANGARESI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from the original conviction and sentence of Hon. M.M Nafula – SRM*

*dated 8<sup>th</sup> June 2018 at the Principal Magistrate’s Court*

*at Ogembo in Criminal Case No. 1968 of 2016)*

**JUDGMENT**

1. The appellant, SINGH BOSIRE NYANGARESI, was charged with the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code (Chapter 63 of the Laws of Kenya). The particulars of the charge were that on 17<sup>th</sup> October 2016 at Borangi Village, Ebioso Sub-location, Mochengo Location, Nyamache Sub-County within Kisii County, he unlawfully killed Mercy Mora. He was convicted and sentenced to four (4) years imprisonment.

The respondent concedes the appeal on grounds that the post mortem report was produced by a person not qualified to the prejudice of the deceased. He however prays for a retrial.

3. The post mortem report relating to the deceased was produced by the investigating officer who told the court that the doctor who prepared it was on maternity leave. Section 77 of the Evidence Act (Chapter 80 of the Laws of Kenya) allows the production of a report under the handwriting of a Government Analyst, Medical Practitioner or any ballistics expert, Document Examiner or Geologist without calling the maker. Such a document is admissible whether or not the maker comes to court. Although the document was admissible, in my view, the accused was highly prejudiced when it was produced by a police officer rather than a medical practitioner. A medical practitioner would be able to respond to questions that relate to the post mortem and therefore the cause of death which is an important element of the offence of manslaughter.

4. I agree with the concession and allow the appeal. However since the matter is still fresh, the appellant shall remain in custody and shall be taken for retrial at Ogembo Magistrate’s Court for plea on 19<sup>th</sup> September 2018. The retrial shall take place before another magistrate other than Hon. Nafula, SRM.

**Dated and delivered at Kisii this 17<sup>th</sup> day of September, 2018.**

**D.S MAJANJA**

**JUDGE**

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Mr. Abobo for the Appellant.