



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Criminal Appeal 102 of 2006

MARY MUTONO KIMILU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of Honourable Mrs. H.A Omondi (CM) dated 8th August 2006 in Machakos CM'S CR.C. No. 3209 of 2003)

JUDGMENT

1. This Appeal arises from the conviction and 12-month sentence meted out to the Appellant, Mary Mutono Kimilu on 8/8/2006 by the subordinate court for the alleged offence of manslaughter contrary to sections 202 and 205 of the Penal Code. It was alleged that on 27/8/2003 at Mlolongo market, Athi-River in Machakos District within Eastern Province, she unlawfully killed Margaret Wangechi Mwangi.

2. The Appeal is conceded and correctly so because Section 200 of the Criminal Procedure Code was not complied with in the course of the trial. Section 200 aforesaid provides as follows;

“200. (1) Subject to subsection (3) where a magistrate, after having heard and recorded the whole or part of the evidence in trial, ceased to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may-

- (a) Deliver a judgment that has been written and signed but not delivered by his predecessor; or**
- (b) Where judgment has not been written and signed by his predecessor, act on the evidence**

recorded by that predecessor, or resubmit the witnesses and recommence the trial.

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resubmitted and reheard and the succeeding magistrate shall inform the accused person of that right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.”

3. Section 200 (3) above was not complied with because although J.R. Karanja, Esq, SPM took the evidence of PW1, Majaliwa Hassan Maumbo, PW2, Dr. Collins Peter Nyakundi, PW3, P.C. Weldon Towett, PW4, Teresia Wanjiku, PW5, John Irungu, PW6, P.C Benjamin Mureria and PW7, Cosmas Kimilu Mwenzi, H.A. Omondi (Mrs) CM, took the evidence of PW8, Dr. Jane Wasike Simiyu on 28/11/2005 but failed to comply with Section 200 aforesaid. That being the case the whole trial was rendered a nullity. I say so with the guidance of the Court of Appeal in the case of **Erick Omondi alias Gor, Cr. Appeal No. 15/2007** where the situation was the same.

4. For that reason, the Appeal must be allowed, the conviction quashed and sentence set aside.

5. The Republic however seeks a retrial which is opposed. I have carefully read the record in this matter and I am convinced that a retrial would not serve the ends of justice because in the first instance, the evidence against the Appellant was inconclusive as to whether she unlawfully killed the deceased. I say so because it is not in dispute that from the evidence of PW4, daughter of the deceased, the deceased was having a sexual affair with PW8, husband of the Appellant. The Appellant was unaware of the affair but stumbled upon the deceased in her husband's house on 8/8/2003 when she arrived there unannounced. What happened thereafter is unclear from the record but certainly, moments later, PW7 found the deceased bleeding from the face and head and the Appellant bleeding from the nose. What triggered their injuries was found by the learned magistrate to be a fight between the two. The Appellant in her defence stated that they were both injured by falling objects in the wooden house as the deceased ran away from the Appellant who had demanded to know who she was and what she was doing in the house. PW7 on the other hand added that the deceased had previously fractured her leg and that on the material day, she fractured it again. PW7 did not see the women fighting but when he entered the house he found both of them on the floor, shouting at each other and injured.

6. The only plausible theory to gather is that the women may have had a fight and the deceased either fell onto something or was pushed and fell and then refractured her leg. PW8 confirmed that the cause of death was a head injury and the fracture consistent with the injuries sustained on the material day. The deceased in fact died on 27/8/2003 after treatment and having been in the care of the Appellant and PW7 during the intervening period.

7. Although therefore the Appellant may have had a hand in the deceased's death, the circumstances were unique and I cannot in all fairness subject her to a retrial, noting the period since the incident which occurred 6 years ago, the time spent in the trial and the period of 2 months spent in custody. Although the only witness to the incident is her husband, PW7, I see no possibility of other witnesses being rounded up fast enough to ensure an expedited trial. I will therefore decline to order a retrial as prayed.

8. In the end, I will allow the Appeal, quash the Appellant's conviction and set aside the sentence.

9. Orders accordingly.

Dated and delivered at Machakos this 2nd day of **July** 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mrs Nzei for Appellant**

N/A for Republic

ISAAC LENAOLA

JUDGE