



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: COCKAR, C.J., KWACH & SHAH, J.J.A.)**

**CRIMINAL APPEAL NO. 107 OF 1995**

**BETWEEN**

**PHILIP MUNYAO MBUVI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

(Appeal from a judgment of the High Court of Kenya at Mombasa (Wambilyangah, J.) dated 21<sup>st</sup> February, 1994

IN

H.C.CR. A. NO. 12 OF 1991)

**JUDGMENT OF THE COURT**

The appellant was originally charged with the offence of murder contrary to section 203 of the Penal Code as read with section 204 of the Penal Code.

On 2<sup>nd</sup> October, 1991 the appellant pleaded not guilty to the charge of murder. The charge was then reduced to manslaughter. It appears that the prosecution accepted a plea to manslaughter contrary to section 205 of the Penal Code, that is that he unlawfully killed the deceased.

It is clear therefore that at the time the appellant pleaded not guilty to the charge of manslaughter, he was no more facing the charge of murder.

However subsequently the trial proceeded on the assumption that he was charged with the offence of murder as is clear from the very first sentence of the judgment of the learned judge in the superior court. Even the summing up by the learned judge was on the basis of murder whilst the appellant was still charged with the offence of manslaughter.

The trial therefore is a nullity. The other aspect of the trial with which we are concerned is that one of the assessors did not sit during the course of the trial, on one day. He was subsequently allowed to return and sit. This is not proper and this aspect also renders the trial a nullity.

In the normal circumstances we would have ordered a retrial but having regard to the fact that the appellant has been in custody for about six years we think the ends of justice will be met by ordering

immediate release of the appellant unless he is otherwise held in lawful custody. It is so ordered and the conviction is quashed and the sentence is set aside.

**Dated and delivered at Mombasa this 15<sup>th</sup> day of January, 1996.**

**A.M. COCKAR**

.....

**CHIEF JUSTICE**

**R.O. OKWACH**

.....

**JUDGE OF APPEAL**

**A.B. SHAH**

.....

**JUDGE OF APPEAL**

**I certify that this is true copy of the original.**

**DEPUTY REGISTRAR**