**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Masime, Gicheru & Kwach JJ A)**

**CRIMINAL APPEAL NO 74 OF 1989**

**Between**

**PETER MBURU KANGETHE.................................. APPELLANT**

**AND**

**REPUBLIC.........................................................RESPONDENT**

**JUDGMENT**

*(Appeal from a conviction and sentence of the High Court at Nairobi, Osiemo J, dated 5th September 1988*

*in*

*Criminal Case No 29 of 1988)*

**********************************

November 3, 1989, the following Judgment of the Court was delivered.

Peter Mburu Kangethe, the appellant in this case was originally charged with murder contrary to section 204 of the Penal Code it being alleged that on the night of 8th and 9th September, 1987, at Kimbo village in Nairobi within Nairobi area, he murdered Sofia Wanjiru. The appellant denied the charge and was remanded in custody.

On 5th September, 1988, the appellant through his Counsel informed the Court that he was willing to plead guilty to the lesser charge of manslaughter. This offer was apparently accepted by the state although the record of proceedings does not bear this out. There then followed this sequence of events:

> “Court: The charge of manslaughter contrary to section 205 is read and explained to the accused person.
>
> ACCUSED: I admit I did kill the deceased, my wife, without intending it.
>
> “State Counsel: On the 8th October, 1987 the deceased went to a house of a certain lady in Kimbo village where she was taking *chang’aa*. Accused found her there and asked her that they leave together after he had also taken *chang’aa*. The two had been living together as man and wife. They left together in the company of another person. On reaching near a bar

> called Corcas the accused and that other man entered the bar and after they had come out, there was a quarrel between the accused and the deceased. That other person who was with them and the accused and the deceased proceeded home. The accused and deceased continued quarrelling even when they reached home. Later that night accused sought help from neighbours to take his wife who had been injured to the hospital. The deceased was pronounced dead soon after she arrived at the hospital. The matter was reported to the police and accused was arrested and charged with this offence. The post mortem on the body of the accused (*sic*) revealed that the cause of death was due to pariatal subdural haemorrhage due to the blunt head injury. I now produce the report as Ex. 1 (underlining ours).
>
> Accused: I do admit the facts as stated."

After this narration of facts the appellant was then convicted on his own plea of guilty and sentenced accordingly.

As the appellant had pleaded guilty he had only a right of appeal against sentence which he thought was harsh and manifestly excessive. But the Court of its own motion, and in the interests of justice, raised the issue whether or not the plea was unequivocal. The statement of facts as narrated to the Court, and admitted by the appellant to be correct, did not disclose, and could not support a conviction for, the offence of manslaughter. It was alleged that the appellant quarrelled with the deceased. There was no allegation that the appellant fought with the deceased or struck her. After both the appellant and the deceased returned home the appellant sought assistance from his neighbours to take his wife who had been injured to the hospital. There was no explanation as to how these injuries were sustained. It may well be that they were caused by the appellant but this was never alleged in the statement of facts.

Secondly, although the judge recorded that the charge was read and explained to the appellant, we could not trace a copy of the charge of manslaughter charge on the original Court file.

As the facts did not disclose the offence charged, the Judge should have declined to enter a conviction for manslaughter. There are cases where a detailed narration of facts can cure a plea which is otherwise equivocal. This Court has recently had to deal with just such a situation in the case of *Daniel Wachira v Republic* (Nakuru Criminal Appeal No. 181 of 1988) where Hancox C.J., reading the judgement of the Court said:

> "The plea 'it is true' was rightly criticised by the learned Judge but he held that it was cured by the subsequent narration of the facts and admission thereto. We agree with him, but in doing so we are not to be taken to encourage this form of plea which has been criticised over the years and must not be used by magistrates, particularly when dealing with serious offences which carry substantial terms of imprisonment."

For the reasons we have stated, we are unable to hold that the plea in this case was valid and on this ground alone we allow this appeal, quash the conviction, set aside the sentence and order the immediate release of the appellant from prison unless he is otherwise lawfully held.

Finally, we would like to point out that the present practice of putting in the post mortem report as part of the statement of facts narrated to the Court by the prosecutor is to be discouraged. Even if parts of the report such as the nature and cause of injuries and cause of death are not disputed, unless the contents of the said report are read out to and admitted by the accused person, the same should not be tendered as part of the facts upon which the charge against the accused is founded. In dealing with the post mortem report, the Court Prosecutor should obtain therefrom all the relevant facts and incorporate them in the statement of facts as is mentioned above.

**Dated and Delivered at Nairobi this 3rd day of November, 1989**

**J.R.O MASIME**

**...............................**

**JUDGE OF APPEAL**

**J.E GICHERU**

**...............................**

**JUDGE OF APPEAL**

**R.O KWACH**

**...............................**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**