



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**(CORAM: BOSIRE, GITHINJI & NYAMU, JJ.A.)**  
**CRIMINAL APPEAL NO. 244 OF 2009**

**BETWEEN**

**GRACE MARTHA MUTHIANI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the sentence of the High Court of Kenya at Machakos (R.N. Sitati, J.) dated 2<sup>nd</sup> August, 2007*

*in*

***H.C.CR.C.NO.12 OF 2007)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appellant was convicted by the superior court (Sitati, J.) on her own plea of guilty for manslaughter, contrary to section 202 as read with section 205 of the Penal Code and sentenced to 25 years imprisonment. She now appeals against the sentence on the ground that the sentence is too harsh in the circumstances.

The facts constituting the offence which were stated by the prosecution at the trial and which the appellant admitted were briefly as follows:-

On 25<sup>th</sup> February 2007 at 5 a.m. the appellant who was the wife of the deceased Alois Muthiani Kivukyu went to the bedroom of the deceased and requested for school fees for one of their four children who was to sit for KAPE examination. The deceased was rude and a quarrel erupted degenerating into a fight. In the course of the fight the appellant hit the deceased several times with a stick. The deceased fell down and apparently died instantly. Thereafter the appellant aided by her children put the body of the deceased in a pit latrine and covered it with soil. The disappearance of the deceased for almost one week was later reported to the Assistant Chief by a neighbour. After the interrogation of the appellant the body of the deceased was recovered from the pit latrine on 7<sup>th</sup> March 2007. The postmortem examination revealed that the skull was fractured at the left parietal region with a piece of skull approximately 15 cm x 10 c.m. missing. The maxilla was also fractured at both sides. Further, the zygomatic bone was also fractured on the right side. The medical officer who performed the postmortem formed the opinion that the cause of death was due to blunt trauma to the head. Mr Ngolya, the counsel who represented the appellant at the

trial called for a non-custodial sentence and as a result the trial judge called for a Probation Officer's report. However the Probation Officer did not recommend a non-custodial sentence saying, among other things, that the community was negative about a non custodial sentence and that the appellant's life was at risk if she returned home.

The trial judge before passing sentence stated thus:

***“The report reveals that the accused has criminal inclinations. The report also reveals that the accused intentionally killed the deceased so as to inherit the deceased's house in Buruburu, and if neighbours had not raised the alarm over the disappearance of the deceased the accused had also planned to eliminate her children so as to conceal evidence of the deceased's death”.***

The trial judge in order to inform herself of the appropriate sentence received a Probation Officer's report pursuant to section 329 of the Criminal Procedure Code. The sentence passed had to take into account the period spent in custody by the appellant. The offence for which the appellant was convicted carries a sentence of life imprisonment.

In this case the appellant was in custody for about five months before she was sentenced. The record does not show that the trial judge took this period in account. More relevantly the trial judge misdirected herself in taking into account unverified matters which were contained in the Probation Officer's report and which were inconsistent with the matters stated in court by the State Counsel. More particularly the trial judge took into account the Probation Officer's report that the appellant had criminal inclinations, that the appellant intentionally killed the deceased so as to inherit the deceased's house at Buruburu and further that the appellant intended to eliminate her children so as to conceal the offence. The record however shows that the appellant was convicted of manslaughter - an unintentional killing which happened in the course of a fight and that the State Counsel asked the court to treat her as a first offender.

There was no concrete evidence to support the motive for the killing stated by the Probation Officer's report to support the serious allegations that the appellant intended to eliminate her children.

On our analysis of the circumstances leading to the death of the deceased we are satisfied that the trial judge misdirected herself in taking into account unsubstantiated factors which were not brought to the attention of the appellant and which were contained in the Probation Officer's report which were inconsistent with the facts narrated by the State Counsel and as a result passed a sentence which was manifestly harsh and excessive.

Accordingly we allow the appeal against sentence, set aside the sentence of 25 years imprisonment and substitute therefor a sentence of fifteen (15) years imprisonment to take effect from the date of the appellant was sentenced by the superior court.

Dated at Nairobi this 7<sup>th</sup> day of October 2011.

**S.E.O. BOSIRE**

.....  
**JUDGE OF APPEAL**

**E.M. GITHINJI**

.....  
**JUDGE OF APPEAL**

**J.G. NYAMU**

.....  
**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**