



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: GICHERU, SHAH & O'KUBASU, J.J.A.)

CRIMINAL APPEAL NO. 96 OF 1999

BETWEEN

JOHN MUIA MULIAPPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Mombasa (Justice Ang'awa) dated 6th March, 1998

in

H.C.CR.C. NO. 18 OF 1995)

JUDGMENT OF THE COURT

Section 213 (a) of the Penal Code is in the following terms:

"213. A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death in any of the following cases -

(a)if he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill, but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill".

In other words, a person inflicting the injury on a deceased person is not deemed to have caused the death of that deceased person if the surgical or medical treatment which is the immediate cause of death of the deceased person was negligent.

On the evening of 20th December, 1991 at Lessesia village in the Taita Taveta District of the Coast Province, a dispute arose between the appellant and his now deceased cousin over a debt emanating from the sale of building stones. In the course of this dispute, the appellant shot the deceased with an arrow on the left side of his chest. Consequent thereto, the deceased was taken to Taveta District Hospital where he

was admitted but died while undergoing medical treatment. Thereafter, the appellant was charged with the murder of the deceased, was tried by the superior court, found guilty, convicted and sentenced to suffer death in the manner authorized by law.

At the trial of the appellant, a post-mortem report was tendered in evidence by Doctor George Otieno (P.W.10) who was of the opinion that the deceased's cause of death was cardiopulmonary arrest secondary to penetrating injury on the deceased's left side of the chest resulting in pneumothorax. According to P.W.10, there was pus and clotted blood in the deceased's pleural cavity. But the deceased had been hospitalised for eleven days during which period, according to P.W.10, he was given proper medical attention. Unfortunately, the nature and extent of that medical attention was not disclosed to the superior court since the notes relating to his medical treatment were never tendered in evidence at the trial of the appellant. Whether or not the deceased's medical treatment at Taveta District Hospital was the cause of his immediate death and that such treatment was employed in good faith or with common knowledge and skill was anyone's guess. It was the bounden duty of the prosecution to establish this aspect of the case against the appellant. This was not done. Consequently, the deceased's cause of death as was found by P.W.10 became unreliable. Nonetheless, the learned trial judge on the evidence available before her proceeded to convict the appellant of the murder of the deceased as is mentioned above. Whether therefore the deceased's cause of death was as a result of medical negligence or sheer medical incompetence is conjectural. In those circumstances, the appellant's conviction for the charge of murder contrary to **section 204 of the Penal Code** is unsustainable. Nevertheless, the arrow injury that resulted in the deceased being admitted in Taveta District Hospital for eleven days was grievous. Consequently, and as the appellant's appeal turns on whether or not there was proof that the deceased's cause of death was as a result of the injury inflicted on him by the appellant, we allow the appellant's appeal to the extent that his conviction for the offence of murder contrary to **section 204 of the Penal Code** is quashed and the death sentence set aside but substitute therefor a conviction of doing grievous harm contrary to **section 234 of the Penal Code** . However, as the appellant has been in custody since his arrest on 7th January, 1992, we, in the circumstances, sentence him for the latter offence to a term that would lead to his immediate release from prison subject to his undergoing corporal punishment of two strokes of the cane.

Dated and delivered at Mombasa this 20th day of January, 2000.

J. E. GICHERU

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

E. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.