



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BOMET**  
**CRIMINAL APPEAL NO 33 OF 2018**  
**NC.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**The charge**

1. On the morning of 18<sup>th</sup> February 2015, a family in Bomet Central woke up to the sound of an infant feebly screaming for life from a pit latrine. With the assistance of neighbours, they demolished the structure and rescued the new born. It did not take the family long to discover that their daughter NCK who was known to be expectant was the one who had delivered and thrown the infant. She was no longer carrying a pregnancy. She was found near the family house looking confused and absent minded. When questioned why she had thrown the baby, she just responded “Ni nini” (What is it?). Women attended to her while the baby was rushed to Longisa Hospital.
2. Subsequently, NCK was arraigned before the Principal Magistrate’s Court in Bomet to answer to a charge of attempted murder contrary to Section 220 (a) of the Penal Code. The particulars of the offence were that on the 18<sup>th</sup> day of February 2015 at about 6:30 a.m. at [Particulars withheld] village within Bomet County attempted to murder EK.
3. The Appellant pleaded not guilty and the case proceeded to trial in which the prosecution called three witnesses being the Appellant’s brother PM (PW1), the Area Chief Kiprono Langat (PW2) and the Investigating Officer Naomi Nyapara (PW3).
4. At the close of the prosecution’s case, the accused was placed on her defence. She gave an unsworn statement and called no witnesses. Her defence amounted to an admission of the offence charged. She was convicted as charged and sentenced to 10 years imprisonment.

**The Appeal**

5. The Appellant was aggrieved by the judgment and filed the present appeal. In her homemade petition dated 15<sup>th</sup> July 2019, she outlined 9 grounds of appeal as follows:-
  - i. That in taking plea, she did not understand the gravity of her response as she thought it was a joke.
  - ii. That the evidence produced by the prosecution was not watertight and the investigations were not sufficient to prove the alleged offence.
  - iii. That the 10 year sentence was excessive and that the previous conviction ought not to have been considered.
  - iv. That she was a single mother of four children who were suffering greatly due to her incarceration.
  - v. That she was remorseful and has since decided to be a law abiding citizen.
  - vi. That her parents are aged and are unable to provide for her children.
  - vii. That she has earned enough skills necessary for her to earn a livelihood once released so that she can take care of her children and her parents.

viii. That she has also undergone counselling and has learned how to deal with the stress in her life and handling difficult situations.

ix. That her medical examination reports were never considered or mentioned anywhere in the judgement and therefore her sentence should be quashed or reduced.

6. Parties took directions on the appeal before Dulu J. on 6<sup>th</sup> November 2019 to canvass the appeal by way of written submissions. The Appellant subsequently tendered her written submissions to the court on 2<sup>nd</sup> December, 2019. When the matter came up for hearing before me on 26<sup>th</sup> January 2021, the Appellant who was unrepresented ignored her grounds of appeal and written submissions and instead asked the court for forgiveness stating that she had reformed and only wished to be reunited with her children.

7. Upon recognizing the Appellant's inability to prosecute her appeal, the court appointed from among counsel who were present in court, Ms. Chemutai to assist the Appellant on pro bono basis. Counsel requested time to peruse the file and upon such perusal sought leave of the court to file amended grounds and supplementary submissions on the appeal.

8. Pursuant to the leave granted, the Appellant's counsel filed an amended Memorandum of Appeal setting out grounds that:-

i. That the learned trial Magistrate erred in law and fact by not asking for a mental assessment report in respect of the Appellant at the time of taking plea where she pleaded guilty to a charge of attempted murder.

ii. That the learned trial Magistrate erred in law by failing to inform the Appellant in a language that she understands the consequences of pleading guilty to the charge of attempted murder which offence attracted a sentence of upto life imprisonment.

iii. That the learned trial Magistrate erred in law by convicting the Appellant to 10 years in prison which conviction is excessive considering the fact that she was not fully in control of her actions at the time of the commission of the offence.

iv. That the Appellant's plea of guilty was not unequivocal as she did not understand the language of the Court.

v. That the trial court erred in fact and in law by meting out a harsh sentence upon the Appellant since it was based on improper conviction.

#### **Submissions**

9. The appellant stated in her homemade and undated submissions titled "Appellant's written leniency submission" (sic!) that:-

**"My Lord, having received the trial court proceedings and perused it, I now beg leave to make my leniency submission in this honourable court. That I was charged with an offence of attempted murder contrary to Section 220 (a) of the Penal Code and sentenced to ten (10) years imprisonment by Hon. P. Achieng at Bomet law court.**

**My submission comes as follows:-**

**My Lordship, mine is to mitigate as I am reformed lady and now I have understood what is wrong and what is right.**

**My Lord, what I did prior, I wish not to repeat. Whatsoever, I pray this honourable court to note that I am a new born again in Jesus Christ.**

**That I wish to inform this honourable court that I have done Grade test in Tailoring, spiritually and counselling.**

**That I pray that this honourable court grant my submission and grant me to enjoy freedom and God bless everyone.**

**Reasons wherefore:- I pray great chance to success."**

10. The Appellant's counsel filed further submissions. She submitted that the Appellant had just given birth to her 4<sup>th</sup> born child against a background of family problems and inability to provide for her children, a result of which she developed post-natal depression which made her attempt to murder her own child.

11. Counsel submitted that the Appellant's guilty plea was unequivocal as she did not understand the language of the court and that the court failed to explain to her the effect of her pleading guilty. She relied on the case of **NK. -Vs- Republic Machakos Criminal Appeal No. 124 of 2015 (2019) eKLR** and quoted the holding of Odunga J. that **"I therefore agree that the manner in which the proceedings were conducted violated the Appellant's right to fair trial and the plea of guilty was in the circumstances not unequivocal."**

12. Counsel further cited the case of **Charles Nyaga Mwiti .V. Chuka Criminal Appeal No. 16 of 2019 (2020) eKLR** in which Limo J. cited **Adan .V. R (1773) EJ 445** where the court held that **"the charge and essential ingredients of the offence should be explained to the accused in a language that he understands and the accused's own words should be recorded and if they are an admission on a plea of guilty be recorded."** She stressed that the Appellant who was suffering from post-natal depression did not understand the charges leveled against her and that the plea of guilty was therefore irregular. On sentence, Counsel submitted that the sentence was excessive.

13. The Respondents on the other hand, submitted that the prosecution had produced sufficient evidence which was duly corroborated by their three witnesses. That the elements of the offence had been proven to the requisite standard as contemplated under Section 220 (a) of the Penal Code and that the sentence metted out against the accused person was legal, lawful and just. On this they relied on the case of **Wanyema vs. R (1971) EA 494** and urged the court not to interfere with the sentence from a lower court.

14. My duty as an appellate court of first instance is to subject the entire evidence to a fresh evaluation. This mandate was aptly described by the court of appeal in the case of **Okeno –Vs– Republic (1972) EA 32** in the following words:-

**“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate’s findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses”**

15. From my consideration of the grounds of appeal, the submissions, and the record, four issues lend themselves for my determination. These are:-

- i. Whether or not the plea was unequivocal.
- ii. Whether an appropriate charge was brought against the accused.
- iii. Whether the court appreciated the phenomenon of post-natal depression in arriving at its decision.
- iv. Whether the conviction and sentence was appropriate.

#### **Whether or not the plea was unequivocal**

16. I will begin with the ground of appeal impugning the plea taking process. In taking plea, the court must satisfy itself that the accused person is made fully aware of the charge leveled against them, the particulars of the offence and the implications of a guilty plea. Courts have underscored the principles that govern plea taking contained in **Section 207 of the Criminal Procedure Code** as follows:-

- a. The plea must be read and explained to the accused in a language that he or she understands. The importance of explaining the charge to the accused person was emphasized in the case of **Charo vs. Republic (1982) KLR, 308**.
- b. The accused person must be present before court to take the plea by themselves as stated in **Ganji vs. Republic (1910-20 2 ULR 101)**.
- c. The plea should be recorded in as nearly as possible in the accused person’s own words as guided by the case of **Wamithanji vs. Republic 1 EALR, 101**.

17. The contention of the Applicant’s counsel is that the trial court entered a plea of guilty without a medical report and without the court explaining to the accused the implication of the charge.

18. I have reviewed the trial proceedings. The record shows that the Appellant was presented before Principal Magistrate J. Ndururi on 20<sup>th</sup> February 2015 for plea. Court assistant Rose was recorded as interpreting English/Kiswahili/Kipsigis. The charge was read to the accused in the Kipsigis language and she answered *“I am not feeling well. I am sick all over.”* The court then deferred plea and ordered that the accused be taken for treatment and mental assessment at Kericho District hospital and the mental assessment report be availed to the court on 6<sup>th</sup> March 2015.

19. The Appellant took plea on 14<sup>th</sup> April 2015 before Hon. Soita, Senior Principal Magistrate. The record shows that the charge was read over and explained to her in the Kipsigis language which she understood and that she answered *“Not true”* in response to which the court entered a plea of not guilty and set the bond terms.

20. The Appellant’s Counsel argued at length in the written submissions that the court entered a plea of guilty which was unequivocal because the Appellant neither comprehended the court proceedings nor understood the seriousness of the charge. However, from the record reproduced above it is clear that the accused neither pleaded guilty nor did the court enter a plea of guilty on the record. Therefore I am satisfied that the plea was taken procedurally and that the arguments faulting the process and the plea entered are not borne by the record. The first and second grounds of the amended appeal therefore fail. The fourth ground of appeal also fails as it has no basis since there was no plea of guilty entered anywhere on the record.

#### **Whether the prosecution brought the appropriate charge against the accused person and whether there was sufficient evidence to prove the same.**

21. Neither the prosecution nor the defence raised any issue with the charge at trial. They have not also raised any issue on this appeal. As required of me, I have reviewed the evidence before the trial court. In so doing, I have looked at the charge and the evidence tendered by the prosecution and also the unsworn defence of the Appellant. In so doing, I have come to the conclusion that the charge leveled against the Appellant may not have been the appropriate charge for reasons that will become clear in this judgment.

22. The Appellant was charged under Section 220 (a) of the Penal Code which provides, ***“Any person who attempts unlawfully to cause the death of another is guilty of a felony and is liable to imprisonment for life.”***

23. The Appellant’s brother (PW1) testified that he heard a baby crying from the pit latrine and that after rescuing him they looked for the accused person because she was recently expectant. They found her near the house and she was no longer visibly pregnant. It was his testimony that she seemed absent minded as she could not understand why she was being asked to explain why she had thrown her baby. The infant was rushed to Longisa hospital.

24. The Appellant was given an opportunity to cross-examine PW1. She did not ask any questions but instead said that everything stated by her brother was the truth. In addition, the testimony of PW1 was corroborated by the chief (PW2) and the Investigating Officer (PW3).

25. The Chief (PW2) testified that on arrival at the scene he found Appellant being fed porridge by some women. When he questioned her, she admitted that she had given birth. That she had thrown the baby because she was disturbed. He left her and followed the infant to the hospital where he found it being treated as insects had entered his body. PW2 stated that he escorted the Appellant to Bomet police station the following day. From this evidence above, it is not disputed that an offence was committed.

26. From the evidence tendered by the prosecution, there is no doubt that the Appellant did indeed deliver and throw her infant into the pit latrine of their home. Her identity was not in issue as she was identified by her brother (PW1) and the local Chief (PW2). The fact that she was expectant was also not in issue. Indeed she admitted before the court that she delivered and threw away the baby.

27. I observe that no medical report was produced to prove that she had been pregnant or that the baby rescued from the pit latrine was hers. However, all circumstantial evidence pointed to her and no one else as the mother of the newborn. As stated before, her brother (PW1) said she was expectant. The infant was rescued from the pit latrine and taken to Longisa hospital while the Appellant was attended to by women who were seen by both PW1 and PW2 giving her porridge. She was later escorted to the hospital to go and breastfeed the infant. These circumstances therefore clearly leave no doubt in mind of the court that the Appellant did give birth and threw the infant into the pit latrine.

28. Besides the prosecution evidence above, the Appellant made material admissions before the trial court in the course of the trial. When given an opportunity to cross-examine her brother PW1, she stated that what he had said was true. Further, when giving her unsworn statement, the Appellant admitted that she was recently pregnant. She also admitted that the child was hers and further that she followed the child to hospital. It was her statement that initially she did not comprehend what had happened. She asked the court for forgiveness.

29. From the above, it is clear that the prosecution proved beyond reasonable doubt that the Appellant attempted to unlawfully cause the death of another as prescribed by Section 220 (a) of the Penal Code. It is my finding however that to the extent that the victim was the newly born child of the Appellant, the prosecution ought to have charged her with the offence of infanticide contrary to Section 210 of the Penal code.

30. **Section 210 of the Penal Code** provides:-

#### **Infanticide**

**Where a woman by any willful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent on the birth of the child, then, notwithstanding that the circumstances were such that but for the provisions of this section the offence would have amounted to murder, she shall be guilty of a felony, to wit, infanticide, and may for that offence be dealt with and punished as if she had been guilty of manslaughter of the child.**

31. In considering whether to substitute the offence of attempted manslaughter with the offence of attempted infanticide as the appropriate charge, I am guided by section 181(1) of the Criminal Procedure Code (Cap. 75 Laws of Kenya) which provides as follows:-

**“When a woman is charged with the murder of her child, being a child under the age of twelve months, and the court is of the opinion that she by a willful act or omission caused its death but at the time of the act or omission she had not fully recovered from the effect of giving birth to that child and that by reason thereof or by reason of the effect of the lactation consequent upon the birth of the child the balance of her mind was then disturbed, she may, notwithstanding that the circumstances were such that but for the provisions of Section 210 of the Penal Code she might be convicted of murder, be convicted of the offence of infanticide although she was not charged with it.”**

32. In **AWM vs. Republic (2009) eKLR – Criminal Appeal No. 156 of 2006**, the Court of Appeal set aside the decision of the High Court in which the Accused person was charged and convicted of murder contrary to section 203 of the Penal Code and thereafter sentenced to detention at the President’s pleasure. The Court of Appeal held that the Appellant was wrongly convicted before the superior court on a charge of murder contrary to Section 203 as read with section 204 of the Penal Code. The Bench set the conviction aside and substituted it with one of a finding of guilty of infanticide contrary to section 210 of the Penal Code.

33. In a charge of murder or attempted murder, the prosecution must prove key elements being the unlawful death of the deceased, and the guilty mind or mensrea of the accused. In contradistinction, the offence of infanticide bears a critical element which is that the Accused must at the time of the offence have had a “disturbance of mind” arising or associated with childbirth.

34. This critical element was explained by the court of appeal in the case of **P.A.O. vs. Republic (2016) eKLR, 22** where it was stated as follows:-

**“An essential element of the offence is that the mind of the Accused person was at the time of committing the offence, 'disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child'. For the Prosecution to successfully establish the guilt of the accused person it must prove, inter alia, the requisite Disturbance of the Mind. It is for this reason that I would agree with the State that where a woman is suspected of infanticide, she should, as a matter of course, be subjected to a Psychiatric Assessment to establish her state of mind at the time of commission of the offence.”**

35. It is evident in the present case that neither the prosecution nor the court appreciated the essential elements of the offence of infanticide. They did not appreciate the facts and circumstances of the case which pointed to the fact that the Appellant must have been suffering from some mental incapacity. A closer look at the evidence of PW1, PW2 and the material admissions of the Appellant herself leads to this conclusion. PW1 stated that when the family found the Appellant she was “*absent minded*” and when asked why she had thrown away the baby she only responded “*Ni nini?*” (what is it?). Chief Kiprono Langat (PW2) told the court that he was called to the scene and the accused confirmed to him that she had delivered. PW2 also told the court that the accused had killed another child before and was convicted and released after serving sentence. That the child died in that case.

36. No. 95429 Inspector Naomi Nyapara who was the Investigating Officer told the court that she interrogated the accused. That **“the accused said that she had given birth that day and was disturbed and that is why she threw the baby. She said that after every delivery, she gets the urge to throw the baby. After throwing the baby the accused did not run away and when questioned, she felt remorseful....”**

37. The Appellant herself stated in her unsworn statement thus:-

**“On the material day at about 5:00 a.m. I saw a light appear. I saw something like a person who told me that I was mistreated. I then did not understand what happened until I was asked what I had done. I did not understand what I had done. I stayed for another five hours is when I remembered that I was pregnant. My senses came back. Since I was being asked questions and after my senses came back, I said that the child was mine. The child was taken to hospital and I followed later to the hospital. After 5 hours I was told to return home. I was then arrested the following day. I asked why I was arrested as I could give an explanation but they did not listen to that. I was then charged in court. I seek forgiveness in court.”**

38. The testimony of the prosecution witnesses above and the unsworn statement of the Appellant clearly reflect that the Appellant must have been suffering some form of mental disturbance or incapacity at the time she committed the offence. The description given by her brother that she was absent-minded, the fact that she threw the baby and remained at the scene tells the court, notwithstanding the fact that she was not immediately subjected to medical examination that she must have had a disturbed mind. These circumstances clearly bring the case within the circumstances described by **Section 210 of the Penal Code**. These circumstances ought to have guided the State on the proper charge to level against the Appellant. The trial court also erred in admitting and trying the Appellant on the charge of attempted murder. It erred in convicting her on the said charge.

39. I am guided by the authorities above and the evidence in this case to hold that the evidence discloses the offence of infanticide and not attempted murder. I therefore substitute the charge of attempted murder with that of infanticide contrary to Section 210 of the Penal Code. Since the Appellant did not succeed in killing the infant, I convict her of the attempt as provided by Section 180 of the Penal Code.

40. At the sentence hearing on 29<sup>th</sup> July 2015, the State informed the court that the accused had a previous criminal record. She had been charged in Bomet Criminal Case No. 961/2011 with the offence of concealing birth and upon conviction was sentenced to 2 years imprisonment. The Appellant confirmed that what the prosecutor had stated was true. She added that she was released on presidential pardon. In her mitigation she stated: **“I seek forgiveness. I have children who depend on me. I am the breadwinner. I seek forgiveness.”**

41. In sentencing the Appellant, the court stated thus:-

**“I have considered the mitigation by the accused and the fact that she is not a first offender. The offence committed by the accused is a serious one and it carries a maximum life sentence. I sentence the accused to serve 10 years imprisonment.”**

42. At this point I make the strong observation that the trial court was faced with a phenomenon less appreciated in our jurisprudence. Whereas Section 210 of the Penal Code which creates the offence of infanticide recognizes the possibility that child birth can cause the disturbance of balance of mind of a new mother, the depth and breadth of that disturbance is yet to be grasped by our criminal justice.

43. In this case the Appellant’s Counsel set out in ground 3 of the Amended memorandum of appeal **“that the learned trial magistrate erred in law by convicting the Appellant to 10 years’ in prison which conviction is excessive considering the fact that the accused person suffered from post-partum and was not fully in control of her actions at the time of commission of the offence.”**

44. I understand the ground to be that the sentence was excessive in view of the mental condition of the accused when she committed the offence. The Appellant’s Counsel however did not make any further compelling submissions to support this ground of appeal.

45. In this judgement therefore, I have ventured into the medical field for limited research to understand the medical condition known as Post-partum depression.

46. By definition, postpartum depression refers to a non-psychotic mood disorder that can affect women during perinatal period to one year after childbirth. There are two categories of this kind of mood disorder i.e. antepartum depression which occurs before birth and postpartum

which occurs after birth. A research study conducted in Nakuru Level 5 Hospital indicated that most women who are affected suffer because of barriers to early diagnosis and treatment. The study stated that mothers required psychosocial support during the perinatal period and that such support should target victims of Gender Based Violence and offer family support[1]. It listed symptoms of post-partum depression to include the following:-

- i. Depressed mood or severe mood swings
- ii. Excessive crying
- iii. Difficulty bonding with the baby
- iv. Withdrawing from family and friends
- v. Loss of appetite or eating much more than usual
- vi. Inability to sleep (insomnia) or sleeping too much
- vii. Overwhelming fatigue or loss of energy
- viii. Reduced interest and pleasure in activities one used to enjoy
- ix. Intense irritability and anger
- ix. Fear that one is not a good mother
- x. Hopelessness
- xi. Feelings of worthlessness, shame, guilt or inadequacy
- xii. Diminished ability to think clearly, concentrate or make decisions
- xiii. Restlessness
- xiv. Severe anxiety and panic attacks
- xv. Thoughts of harming oneself or baby; and;
- xvi. Recurrent thoughts of death or suicide

47. The study went on to indicate that the prior mental health of a mother was a strong determinant of postpartum depression especially previous history of depression, presence of antepartum depression, experiencing stressful events during the pregnancy, and low perceived levels of social support. Other contributory factors are low-income backgrounds and single motherhood status.

48. Another study showed that in Kenya postpartum depression was prevalent among HIV Positive mothers at 48%, Pregnant Adolescents at 58% and mothers with malnourished babies at 66%. [2] Studies further indicate that the following factors could lead to this mood disorder [3]:-

- History of depression, either during pregnancy or at other times
- Bipolar disorder
- Previous case of postpartum depression after a previous pregnancy
- Having family members who've had depression or other mood disorders
- Mother experiencing stressful events during the past year, such as pregnancy complications, illness or job loss
- Health problems or other special needs with the baby
- Mother having multiple births
- Mother having difficulty breast-feeding
- Mother having problems in relationship with spouse or significant other
- Mother having a weak support system
- Mother having financial problems
- Unplanned or unwanted pregnancy

49. Postpartum depression if untreated may recur amongst mothers in subsequent pregnancies. Further, it may lead to a more severe form of the disorder known as Postpartum psychosis or puerperal psychosis. Postpartum psychosis has been defined as delirium associated with puerperal sepsis (i.e. infections and fever arising from complications following childbirth). It is a mental condition characterized by agitation,

delirium and attacks of mania which result from suppressed lochia discharge that is transported to the brain[4]. The resultant adverse symptoms include: confusion and disorientation, obsessive thoughts about the baby, hallucinations and delusions, sleep disturbances, excessive energy and agitation, paranoia; and attempts to harm yourself or your baby (suicide and infanticide)

50. According to Prof. Ladd, it is also considered a severe disorder and a rare condition that typically presents as bipolar disorder or psychotic depression[5]. Other studies show that the consequences of allowing maternal depression to go undiagnosed hence untreated are detrimental to the health of the mother, her infant and other family members[6]. It affects 1 in every 1000 women. The study further explored the causes and documented the physical changes and emotional issues which negatively affect the new mothers and may cause depression.

51. Another study documented numerous clinical diagnosis which demonstrates that two thirds of women who kill their children in the wake of childbirth suffer from postpartum psychosis. They further demonstrate that the risk of psychosis necessitating psychiatric hospitalization is the highest during the first month following childbirth and continues to be a significant risk through the second postpartum year.[7] Additionally, such women do remain at high risk of the same recurring in future if pregnancy occurs within 2 years.

52. It is now clear from the above referred studies that post-partum depression is a condition which *prima facie* can be said to be outside the control of the individual mother affected. It is my view that more local scientific studies ought to be undertaken in order to inform the necessary medical interventions.

53. The next issue of research interest in this judgment is how the criminal law and process has responded or continues to respond to the effects of post-partum depression and related offences. What I could gather from my reading of various studies is that different jurisdictions have responded to this medico-legal condition differently.

54. In American jurisdictions courts have taken postpartum psychosis as a defense since this offence occurs with no apparent motive by the mother and further, because is not premeditated or willful[8]. Some courts have therefore overturned jury verdicts that did not recognize mental state as a mitigating factor in cases of infanticide. An example is a case in California in 1990, where one Sheryl Massip was charged with murdering her six-week-old son by intentionally running over him with her car and placing him in a trashcan, after which she reported him kidnapped. Psychiatrists testified that, at the time of the crime, she had been experiencing suicidal ideation and auditory hallucinations that her son was the devil. She was found guilty of second-degree murder and incarcerated. Two months later, however, a judge set aside the jury's guilty verdict, and acquitted her on insanity grounds. She was sentenced to one year of outpatient treatment. The decision was affirmed on appeal.

55. In Nevada, a case was reported where, Pamela Sue Clark a mother, wrapped her infant with a blanket and abandoned it in the desert outside Las Vegas. She pleaded not guilty by reason of insanity. A jury convicted her of attempted murder and the Supreme Court of Nevada upheld the conviction. The reviewing court noted that there was substantial evidence in the record to support the jury's conclusion that Clark had not sufficiently established her insanity defense. The jury determined that the defendant had the capacity to tell right from wrong and knew what she was doing when she committed the crime in question.[9]

56. In yet another famous case of **Yates vs. State**[10], the Accused person had a history of psychotic postpartum depression. By the time her 4<sup>th</sup> child was born, her mental health had declined and she suffered full blown psychosis. She had been warned by her psychiatrist not to have any other children, but being driven by her husband's desire to have a big family, she conceived a 5<sup>th</sup> child. She ended up killing her 4 sons and 1 daughter by drowning and was convicted of capital murder and sentenced to life imprisonment. However, her conviction was later overturned by the appeals court which found her not guilty on account of insanity. She was instead committed to a mental institution in Texas.

57. Another study conducted by Law Professor Daniel Maier Katkin in America, demonstrated that amongst 24 women who relied on postpartum psychosis as a legal defense[11], there was a discrepancy in the manner in which they were treated as follows: 8 women were acquitted, 4 were put on probation, 10 were sentenced to between three - twenty years imprisonment while the last two were sentenced to life imprisonment.

58. In Britain, the medical and legal authorities recognize Post partum depression/Post partum psychosis as a serious women's health issue and as a viable insanity defense.

59. In South Africa, a serious degree of mental illness or defect, at the time of a commission of the offence, may constitute a complete defense in terms of section 78(1) of the Criminal Procedure Act. A less severe degree of mental illness or defect will not necessarily have the effect of completely exonerating the accused from criminal liability but may result in a finding of diminished responsibility in terms of Section 78(7) of the Act. Such diminished responsibility will be taken into consideration for the purpose of sentencing, giving rise to a more lenient sentence.

60. In Kenya, the case law cited earlier shows that courts invariably reduce the more serious charge of murder to infanticide which attracts a lesser sentence. Case law however shows that courts were reluctant to treat **Section 166 (i) of the Criminal Procedure Code** as affording a mother charged with infanticide of a complete defence. **Section 166 (i)** provides:-

**“Where an act or omission is charged against a person as an offence and it is given in evidence on the trial of that person for that offence that he was insane so as not be responsible for the acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.”**

61. In my view, the application of **Section 166 (i) of the Criminal Procedure Code** to infanticide offences may have the unintended

consequences in the sentence to follow. Sub Section (2) requires the court to report the case for the order of the President who may order the person to be detained in a mental hospital, prison or other suitable place of safe custody.

62. The orders made under Sub-section (2) and (3) may therefore have the unintended consequence of lengthy incarceration for a mother who may just be in need of medical treatment, psycho-social support and re-union with her children. Each case would of course be dependent on its unique facts and in particular seriousness of the mental illness and availability of the requisite support system.

63. Back to the present judgment, I am called upon to consider an appropriate sentence in the circumstances of this case. As already stated elsewhere in this judgment, the Appellant was a repeat offender. That explains why she was given a stiff sentence of 10 years. In the light of the above research and case law earlier cited, it is apparent that the sentence was not appropriate. A stiff sentence would teach her nothing and it would be no deterrent if she was mentally ill or susceptible to post-partum depression. What the Appellant needed then, and even now, was medical treatment and psychosocial support.

64. It was apparent to this court that the Appellant was remorseful. The record shows that when she first appeared before this court to prosecute her appeal she addressed the court thus:-

**“...I know why I am in court, to ask for forgiveness. My children are suffering. I wish to reunite with my children.”**

65. The court also called for a Probation Officer’s report in respect of the Appellant. The undated report was filed in court on 21<sup>st</sup> January 2021. It states that the Appellant was a single mother of 4 children. She is the 5<sup>th</sup> born in a family of 8 children and dropped out of school in class seven due to teenage pregnancy. That the family lived in extreme economic hardship and the Appellant’s children had dropped out of school during her incarceration. According to the Probation Officer, the Appellant’s family acknowledged in the report that she was sick and needed treatment and support. The report recommends that she be released on probation and accorded medical treatment.

66. I have considered the Appellant’s mitigation and the probation officer’s report. I am persuaded, based on the discourse already highlighted in this judgment and the Probation Officer’s report, that the Appellant shall benefit from a non-custodial sentence.

67. The Appellant is released to serve 2 years on probation. Her probationary terms include mandatory medical treatment at government cost in a government facility, and; socio-economic re-integration facilitated by the probation office in collaboration with the National and County Government’s Ministry of Gender, Youth Sports, Culture and Social Services.

68. The Deputy Registrar of the court is directed to bring this judgment to the attention of the agencies named above.

69. Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 20<sup>TH</sup> DAY OF MAY, 2021**

.....

**R. LAGAT-KORIR**

**JUDGE**

**Judgment delivered in the presence of the Appellant, Defence Counsel Ms. Chepkemoi, Mr. Mureithi for the Respondent and Kiprotich (Court Assistant).**

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[1] Kenyatta University Institutional Repository- *Prevalence of Postpartum Depression Among Mothers attending Nakuru Level 5 Hospital in Nakuru County, Kenya* by Tuitoek Doris Jeptalam, 2019.

[2] *Demographic, psychosocial and clinical factors associated with postpartum depression in Kenyan Women* – BMC Psychiatry - [bmcpsychiatry.biomedcentral.com](http://bmcpsychiatry.biomedcentral.com)

[3] <https://www.mayoclinic.org/diseases-conditions/postpartum-depression/symptoms-causes/syc-20376617>

[4] Hippocrates in 460 BC

[5] Charlotte Ladd, MD, associate professor of psychiatry at the University of Wisconsin in Madison

[6] *Prevalence of postpartum depression among women delivering at Kenyatta National Hospital* – Research done by Dr. Virginia Mwikali Musau, MBChB.

[7] Velma Dobson & Bruce Sales, *The Science of Infanticide and Mental Illness* 6 psychol. Pub. Pol’y and L, 1098, 1102 (2000)

[8] *Postpartum Psychosis, infanticide and criminal justice*, University of Pennsylvania Press/1992 by Daniel Maier Katkin

[\[9\]](#) Clark v. State, 588 P.2d 1027, 1028 (Nev. 1979).

[\[10\]](#) 171 S.W.3d 215 (Tex. App. 2005)

[\[11\]](#) Michele Connel, The Postpartum Psychosis Defence and Feminism: More of Less Justice for Women? CASE W. RES 143, 146-47 (2002)