REPUBLIC OF KNEYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 77 OF 2019

(From original conviction and Sentence in Kitale Criminal Case No. 3687 of 2019 delivered by M.N. Osoro – RM)

MIRIAM AROT MELI.....APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

JUDGEMENT

The Appellant, **Miriam Arot Meli** was charged with the offence of **Child neglect** contrary to **Section 127 (1) (a)** of the **Children Act.** The particulars of the offence were that **on 27th May 2019** at **Kachibora Trading Centre, Trans Nzoia County**, being the mother of **EKM,** a child aged 13 years, **EKM,** a child aged 11 years and **VCM**, a child aged 9 years, the Appellant abandoned and refused to provide basic needs to them. When the Appellant was arraigned before the trial Magistrate's court, she pleaded guilty to the charges. She was convicted on her own plea of guilty and sentenced to serve five (5) years imprisonment.

The Appellant is not challenging her conviction in her petition of appeal. She is however pleading with the court to reconsider her sentence. She states that the trial Magistrate erred in failing to take into consideration that she was the sole breadwinner of her family, her husband having abandoned her. She pleaded with court to consider the fact that her children, who are all aged below eighteen (18) years need her to provide them with motherly love; her continued incarceration has caused her children to suffer greatly. In her oral submission before court, she stated that she was remorseful, had learnt her lesson during the period of about two years that she has been in jail, she had learnt useful trades while in Prison that will make her a useful member of the society and finally she asked the court to give her a second chance at life so that she can take care of her children.

Mr. Omooria for the State opposed the Applicant's application for review of her sentence. In his written submission, he stated that the Appellant was properly convicted on her own plea of guilty. The sentence that was meted on the Appellant was legal. The issues raised by the Appellant in this appeal were an afterthought; she did not raise them when she appeared before the trial Magistrate's court; that the Appellant was extremely callous in the matter. She neglected the children and exposed them to mortal danger. In the premise therefore, he urged the court to dismiss the appeal.

This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced before the trial court with a view to ascertaining whether such evidence supported the conviction and sentence. In the present appeal, the issue for determination is whether the Appellant made a case for the review of her sentence. The Principles to be considered by this court in determining whether or not to interfere with the sentence imposed by the trial court are well settled. This court will not interfere with the sentence imposed unless it is established that the sentence was either too harsh or too lenient as to constitute an aberration to the precepts of justice. Furthermore, the court will interfere with the sentence if the trial court either failed to apply the correct Principles of applied the wrong principles in arriving at the sentence (See Simon **Kipkurui Kimori -vs- Republic [2019 eKLR]**).

In the present appeal, it was clear to this court that the trial court committed an error in principle when it sentenced the Appellant to serve a lengthy custodial sentence. Before sentencing the Appellant, the trial court should have taken into consideration what effect a custodial sentence would have on the children that were the subject matter of the case. Under **Article 53(2**) of the **Constitution** and **Section 4 (3)** of the **Children Act,** courts are extolled to always have the best interest of the child and make it to be of paramount consideration when determining any issue that may affect the welfare of the child.

In the present case, although the Appellant had persistently neglected her children due to large extent to her proactivity to drinking alcohol, the court should have taken into consideration the fact that by sentencing the Appellant to serve a long term in Prison, the welfare of her children would be adversely affected, taking into consideration the fact that all her children were by then aged less than thirteen (13) years.

It is instructive that before sentencing the Appellant as the mother of the children, the trial court did not make any inquiry to determine where the father of the children was and whether it could use its co-ercive jurisdiction to compel the father to also take up his parental responsibility and take case of the children.

To hold the Appellant solely accountable for the neglect of the children without further inquiry, was in my view a misdirection and an error in principle. Although from the children Department's report it appears that the children are now being taken care of by the grandparents during the Appellant's incarceration, it was clear to the court that the children being of young and tender years require maternal love which, despite the Appellant's personal challenges, can only be provided by the mother. The lengthy custodial sentence that was imposed by the trial Magistrate's court was therefore uncalled in the circumstances.

For the above reasons the Appellant's appeal on sentence shall be allowed as a result of which the Appellant's custodial sentence imposed is hereby commuted to the period served. She is set at liberty forthwith and released from prison unless otherwise lawfully held.

It is so ordered.

Dated at Kitale this 27th day of July 2021.

L. KIMARU

JUDGE