



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CRIMINAL APPEAL NO. E003 OF 2021

(Being an Appeal from the Conviction and Sentence in Criminal Case Number 114 of 2020 – Bomet by Hon. K. Kibelion, Senior Resident Magistrate)

ANITA CHEPKEMOI LANGATAPPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

1. The Appellant, Anita Chepkemoi Langat was charged with the offence of Infanticide contrary to Section 210 of the Penal Code. The particulars are that on 25th day of January 2020 at Kurumana village in Chepalungu Sub-County within Bomet county, killed her baby namely DC, a child under the age of twelve (12) months by jumping with her in an open water pan. She pleaded guilty to the charge.
2. The facts as presented by the prosecution were that on 26th January 2020 at 8:37 am the Chief Siongiroi location reported that the body of a small child had been seen floating in a dam within Siongiroi. Police officers responded where they discovered the body of the child aged 12 months daughter of accused and Wilson Langat. Upon enquiry it was suspected that the accused might have committed suicide with the child. A search was done and the accused was found at the nearby village. She admitted jumping into the water with the child. The accused was arrested. The body was taken to Longisa mortuary. The immunization card was produced as P-exhibit 1.
3. The Appellant confirmed the facts and was convicted on her own plea of guilty. She was sentenced to serve seven years in prison.
4. Being aggrieved by the decision of the lower court, the Appellant filed her Appeal dated 17th December 2020 expressing her dissatisfaction with the findings of the trial court. In her home made petition which is titled “Mitigation of Appeal”, the Appellant set out the grounds reproduced verbatim as follows:-
 - i. THAT I am a first offender, the daughter of a single mother, the bread winner of our family and my one child.
 - ii. THAT I am 22 years old and the 7 year sentence will hinder my life because my family needs help.
 - iii. THAT when I came to prison, I was eight months pregnant and have delivered in prison and the baby is now 2½ months old and was now vulnerable especially due to the COVID-19 pandemic.
 - iv. THAT the Honourable Court do quash the Conviction and treat the case as a family affair.
5. The appeal came up for directions on 19th July 2021 and parties agreed to proceed by way of written submissions which the Appellant duly filed on 5th October 2021. The Respondent did not file written submissions and submitted orally.
6. This court’s duty is to evaluate and scrutinize evidence on record and draw its own independent conclusions. The Court of Appeal in the case of **Mark Ouiruri Mose Vs. R (2013) eKLR**, held that:-

“This court has a duty to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter.”

The Appellant’s submissions.

7. The Appellant submitted that she was a 22 year old Kenyan who was married with three children, including one who was deceased. That on the material day, her husband started quarrelling her when she told him that she was pregnant. It was the Appellant's further submission that the husband denied responsibility and told her that the pregnancy belonged to someone else. That at that point, he removed her from their house at his place of work in Naivasha and dispatched her back to his parent's home. That his parents tried to intervene but he remained adamant.

8. It was the Appellant's submission that the devil used her when she threw herself and her child into a water well. That she was confused and could not comprehend what had happened to her.

9. The Appellant further submitted that she was imprisoned while pregnant and had given birth in prison. That at the time of the offence she was ignorant but that she was now rehabilitated, and had reformed and become a changed person.

10. She prayed that this court quash the conviction or give her a non-custodial sentence.

Prosecution case

11. The prosecution submitted that the Appellant had pleaded guilty and that her submission was only on mitigation. They further stated that the 7 year sentence was in accordance to the law and urged this court not to interfere with it.

12. I have gone through and considered the trial court proceedings, the Appeal dated 17th December 2020, the Appellant's written submission filed on 5th October 2021 and the Prosecution's oral submissions. The only issue for determination is whether the Sentence meted out against the Appellant was excessive.

13. It was not in dispute that the Appellant was convicted on her own plea of guilt. It follows therefore that the Appellant cannot appeal her conviction. Section 348 of the Criminal Procedure Code (CPC) provides that:-

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”

14. It is not enough however for a first appellant court to conclude that every conviction on guilty plea falls within Section 348 of the CPC. The court must determine whether or not such plea was unequivocal as required by law. I agree with the holding of Majanja J in the case of **Balunye Ole Kortol Vs Republic (2018) eKLR**, that:-

“Although Section 348 of the Criminal Procedure Code bar an appeal in the case of conviction following a conviction, the only way our courts have to address whether the sentence was legal is to address whether the plea recorded in the lower court was equivocal which would make the conviction unlawful and thus implicate the legality of the sentence.”

15. In this case, there was no argument as to whether the plea was unequivocal or not. I have however keenly perused the trial record. I am satisfied that the plea was taken procedurally and that the Appellant understood the charge and consequences thereof when she pleaded guilty. I am therefore satisfied that the appeal against conviction contained in the fourth ground is not merited.

16. With regard to Sentencing, I take guidance from the case of **Bernard Kimani Gacheru Vs Republic (2002) eKLR**, where the Court of Appeal stated that:-

“It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

17. In this case, the Appellant was charged under Section 210 of the Penal Code as read with Section 205 of the Penal Code. The provisions state:-

(210) Where a woman by any wilful act or omission causes the death of her child being 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.”

(205) “Any person who commits the felony of manslaughter is liable to life imprisonment.”

18. The Penal Code provides for a maximum sentence of life imprisonment if one is convicted for the offence of infanticide.

19. The wording of Section 210 of the Penal Code acknowledges the possibility of a new mother having a disturbed mind by virtue of not

having recovered from the effects of child birth and the consequent effect of lactation. Though not pleaded, this court takes judicial notice that some mothers may suffer prenatal and post-natal depression also known as prenatal and postpartum depression which condition may lead such a mother to act irrationally and harm her baby.

20. This court had occasion to examine more closely the application of Section 210 of the Penal Code and the causes of pre-natal and post-natal depression in the case of **Nancy Cherono Vs. Republic, Bomet Criminal Appeal No. 33 of 2018 (2021) eKLR** and had this to say:-

(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.

(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*

(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.

21. In this case, the trial court did not have the benefit of the accused person's testimony because she pleaded guilty. However, from her submissions in this court, she indicated that she was 22 years old, a single mother and the breadwinner in her family. That she had given birth in prison as she was imprisoned while pregnant. In her submissions, she stated that her husband begun quarrelling her when he realized she was pregnant. That the husband denied responsibility for the pregnancy and took her to his parent's home.

22. A Probation Report was filed in court on 2nd September 2021 and it indicated that the Appellant went to school upto class 6 where she was forced to drop out of school due to teenage pregnancy. That after staying at home for a while, she settled for marriage with one Wilson Kimetto. The Probation Report further stated that their marriage became rocky and the Appellant alleged that while at their matrimonial home, her husband became hostile to her while attempting to drive her back to her parents' home (sic!).

23. From the above, it is clear to this court that the circumstances that the accused person faced could possibly have caused her to suffer some depression either pre-natal or post-natal as contemplated by Section 210 of the Penal Code. I must hasten to clarify that such state of mind does not justify the unlawful act. However, a clear appreciation of the circumstances faced by the Appellant in the light of the likely causes of post-partum depression would lead the court to an appropriate sentence for the offence.

24. In the persuasive South African case of **S. vs. Campher 1987, 1 SA, 940 (A)**, the court held that:-

“A mental illness that has the specified effect can be temporary or permanent. The only factor that is taken into account is the fact that the mental illness existed at the time of the commission of the act. This guideline is very important for the purpose of postnatal depression due to the varying lengths of symptoms associated with the condition. In most instances, the accused will no longer be suffering from any symptoms by the time that the case is actually before that court. In view of the above, the trial court should have considered the state of mind of the accused at the time of committing the offence and not merely during trial.”

25. It is trite that the purpose of sentencing is retribution, deterrence, incapacitation, rehabilitation and restitution. The court must therefore consider an appropriate sentence for such an offence. In the case of **Gladys Kemunto Onduso Vs. Republic (2009) eKLR**, the Appellant was charged, convicted and sentenced to 7 years imprisonment for the offence of attempted infanticide. On appeal, she was released by the Appellate Court upon consideration of the fact that she was a first offender and that she had expressed willingness to take care of her new born baby.

26. The Probation Report in this case indicated that the Appellant was a first offender and that she was remorseful. It further stated that her family was ready to receive her back home and she would be assisted to reunite with her child while she nurses her new born. In mitigation, the accused person prayed for forgiveness and a second chance to take care of her infant children at home.

27. It is clear to this court that the Appellant is remorseful and desires to turn her life around. Her demeanor when urging her appeal demonstrated the remorse. This court has no doubt that she requires rehabilitation, psychosocial support, and societal reintegration.

28. The Appellant will benefit from the leniency of this court bearing in mind the circumstances elucidated above. The Appeal succeeds and to the extent of the Sentence only.

29. I set aside the 7 year imprisonment term and substitute therefor a 3 year probation sentence. She shall attend mandatory counselling and socio-economic empowerment training as directed by the Probation Officer in collaboration with the National and County Governments' departments of Gender, Youth, Sports, Culture and Social Services.

30. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED THIS 24TH DAY OF NOVEMBER, 2021.

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R. LAGAT-KORIR

JUDGE

Judgment delivered in the presence the Appellant, Mr. Murithi for the Respondent and Kiprotich (Court Assistant).

[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.