



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE APPEAL NO. 106 OF 2019

SALOME KERUBO NYOKECHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of G Barasah RM dated 19.12.2019 in Ogembo SPM Cr. Case No. 424 of 2019)

JUDGMENT

1. The appellant being dissatisfied with the judgment of Hon. Barasah R.M. dated 19th of December 2019 filed a petition of appeal dated the 31st December 2019. The appellants grounds of appeal as follows;

- i. *That the Learned Trial Magistrate erred in law and infact in convicting the Appellant against the weight of evidence on record*
- ii. *That the Learned Trial Magistrate erred in law and infact convicting the Appellant when the charges before her was unequivocal admission of guilt.*
- iii. *That the Learned Trial Magistrate erred in law and infact in convicting the Appellant when the language of the court was not explained.*
- iv. *That the Learned Trial Magistrate erred I law and infact in sentencing the Appellant to 3 years imprisonment which was excessive in the circumstances.*

2. The appeal came for hearing on the 20th February 2020. The appellant pleaded for leniency. Mr Otieno for the State submitted as follows that; from the court record that there was indication on whether a plea was taken, the language of the court was not indicated nor was a plea of guilty entered after the words “it is true”. No conviction was entered and there was no mitigation from the appellant. That what followed was a sentence of 3 years after the court considered a probation report which indicated that the appellant was a flight risk.

3. As the first appellant court I have reviewed and analysed what happened before the trial court. The appellant was charged with the offence of Child Abuse contrary to section 13 (1) as read with section 20 of the Children Act. The appellant was presented in court on the 9th December 2019. The language of the court is not indicated. The court record does not indicated the language used by the court to read the charge to the appellant. The appellant response is indicated as “True”. Thereafter facts were read and the response is, “It is true”. No plea of guilty was recorded nor was there a conviction on the facts read to the appellant. Thereafter there was a mention on the 19thDecember 2019. The appellant was present no mitigation was taken. The court record indicates the courts stating the following, “The court notes that there is a cover up into the issue and real culprit is known summons to issue to DCIO and OCS Etago to come and explain why they have made shoddy investigations into this matter. Mention 23/12/2019. Probation officer report isnot positive. Sentence to 3 years imprisonment no option.

4. Section 207 provides that once an accused is brought before the trial court the substance of the charge is read to the accused. The court is required to explain the charge and all the elements of the offence to the accused in a language he or she understands (see Adan v R [1973] EA). There is no indication that this was done. After the charge is read the accused is required to admit or deny the facts. Once the response of the accused is obtained it is to be recorded and if an accused pleads guilty then a plea of guilty is formally entered(see section 207 (2) and (3). This is to ensure that the plea of guilty is unequivocal. This was not done by the trial court. The trial court’s record is really wanting. The conviction was improper and it is set aside for the trial court failed to follow the procedure of taking plea and conviction. On the sentence the penalty section, section 20 provides as follows;

“Notwithstanding penalties contained in any other law, where any person wilfully or as a consequence of culpable negligence

infringes any of the rights of a child as specified in sections 5 to 19 such person shall be liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine.”

The appellant was sentenced to 3 years imprisonment yet the penalty section of the offence she was charged with provides for a term of imprisonment not exceeding twelve months. The sentence was excessive. Having set aside the conviction I set aside the sentence too. The appellant appeal succeeds she is free to go unless lawfully held.

Dated, signed and delivered at KISII this 27th day of February 2020.

R.E.OUGO

JUDGE

In the presence of;

Appellant In person

Mr. Otieno Senior State Counsel Office of the DPP

Rael Court Assistant