



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MARSABIT**  
**CRIMINAL APPEAL NO.8 OF 2017**

**E H..... APPELLANT**

**VERSUS**

**REPUBLIC ... RESPONDENT**

*(From original Criminal Case No.365 of Principal Magistrate's court at Marsabit)*

**JUDGEMENT**

The appellant was charged with the offence of infanticide Contrary to Section 210 as read with Section 205 of the Penal Code. The particulars of the offence were that the appellant, on the 31<sup>st</sup> day of July, 2017 at about 1300 hours at Manyatta Shauri Yako in Marsabit Central Sub-County within Marsabit County, killed a new born baby boy namely M by dumping it in a pit latrine.

The appellant pleaded guilty to the charge and was sentenced to serve seven (7) years imprisonment.

The grounds of appeal are that the sentence is harsh and excessive and that a non-custodial sentence is the ideal punishment. Miss Muna appeared for the appellant. Counsel submit that the sentence is excessive. The appellant is a first offender and pleads for leniency. Although the trial Court indicated that there was a probation officer's report, no such report was filed in court. The appellant is 19 years and did not understand the repercussions of her action. In her community, getting a child out of wedlock is a taboo. She is a first born in a family of 7 children. Her mother is a widow. Counsel relies on the case of ***P.A.O. V Republic, Busia High Court Criminal Appeal Number 3 of 2015.***

Mr. Chirchir, Prosecution Counsel, conceded to the appeal. Counsel submitted that the Sentence is harsh and excessive. The appellant is 19 years old. She was under lactation period and she was charged immediately. Mr. Chirchir submits that it is a case fit for probation.

The facts of the case before the trial Court reads as follows:

That on 31.7.2017 at around 12.30pm at [Particulars withheld], village a member of the public that resides at the house of Ibrahim Chale went to a pit latrine and heard a child crying. He called neighbours who confirmed that a child was crying in the latrine. They demolished the toilet and removed a boy child and rushed him to the hospital. They also looked for Chief Hussein Chafi. One of the neighbours indicated that one E H was pregnant but was not at the vicinity. Accused who was the suspect was traced to a saloon in town. She was arrested, escorted to hospital and examined. She was confirmed to have given birth recently. The boy child unfortunately passed on. Medical records for the accused confirming that she had given birth recently were produced.

The appellant was charged in Court on 3.8.2017. This was about three days after the incident. The appellant pleaded guilty. In her mitigation, she stated that she was confused. The trial Court called for a pre-sentencing report. The report dated 15.8.2017 by the Probation officer, Julius K. Mathenge, gives the details of the appellant's family. The appellant's parents are named in the report and are alive. The appellant's other siblings are stated as three namely B G (form 3), G (class 7) and D (standard 6). The appellant dropped out of school while she was in form 3 to allow her brother join Secondary school as he had performed well in his KCPE exams.

According to the Probation officer's report, the appellant indicated that she felt some pain and went to the toilet. She thought that it was a natural call of nature. She pushed and the child fell in the pit latrine. The Probation officer did not believe the appellant's explanation.

From the circumstances of the case, it is clear that the appellant knew that she was pregnant. It appears that she was alone when she opted to dump the child in the pit latrine. The fact that the appellant's community does to tolerate children born out of wedlock cannot be a good reason to commit the offence.

Section 210 of the Penal Code states as follows:

**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 the 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.**

The main issue being raised in this appeal is that the sentence is harsh. In the case of *P.A.O V Republic (Supra), Justice F. Tuiyot* set aside a 7 years' imprisonment sentence for the offence of infanticide and replaced it to the period of about 17 months imprisonment already served by the appellant. The judge was of the opinion that a custodial sentence was not ideal in the circumstances. In the case of *Beatrice Wambua Kariuki V Republic, Nairobi Criminal Appeal No.277 of 2004*, the appellant was charged with the offence of Infanticide. She was sentenced to serve 10 years imprisonment after pleading guilty to the charge. Justice Makhandia (as he then was) on 21.9.2005 set aside the 10 years imprisonment sentence and replaced it with the period already served. The offence had been committed on 13<sup>th</sup> February 2003.

In the case of *AWM V Republic, Nyeri (Court of Appeal Criminal Appeal No.156 of 2006)*, the appellant was charged with the offence of murder. The victim was the appellant's young baby. The High Court convicted the appellant who was 17 years old and sentenced her to be detained under the President's pleasure pursuant to Section 25(2) of the Penal Code. The Court of Appeal allowed the appeal, set aside the sentence and set the appellant free in view of the period of about three years already served.

Taking the circumstances of the case, I do agree with both the contention of Miss Muna and Mr. Chirchir that the sentence is excessive. The appellant is not a child but at 19 years old, she is still undergoing transformation from childhood to that of youthful age. Sentencing her to 7 years imprisonment is not ideal in the circumstances. She was kind enough to drop out of school so as to allow her brother continue with his education

I do find that the conviction was proper. The sentence is however excessive. The appellant has served exactly two (2) months imprisonment. The 7 years imprisonment is set aside. The appellant to serve six (6) months Probation Under the guidance of the Marsabit Probation Officer. The appellant to be released from Prison and handed over to the Probation Officer.

**Dated, Signed and Delivered at Marsabit this 17<sup>th</sup> day of October 2017**

**S. CHITEMBWE**

**JUDGE**