PAO v Republic (Criminal Appeal 3 of 2015)
[2016] KEHC 4963 (KLR) (19 May 2016) (Judgment)

P A O v Republic [2016] eKLR

Neutral citation: [2016] KEHC 4963 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL 3 OF 2015

F TUIYOTT, J

MAY 19, 2016

BETWEEN

PAO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against conviction and sentenced by Hon. B.O. Ogolla Chief Magistrate In CM Criminal case no.37 of 2015 delivered on 12.1.15)

It was a mandatory to establish the state of mind of an accused charged with the offence of infanticide.
The court discussed the elements necessary for a charge of infanticide to stand holding that the state of mind of the accused at the time of commission of the offence was critical. It found that, in the instant case, the prosecution had failed to state the appellant had suffered such mental disturbance at the time of the commission of the offence as was required by section 210 of the Penal Code.

Reported by Emma Kinya Mwobobia

Criminal law *- infanticide - where a mother was charged with unlawfully killing her son aged 1 month by strangulation and throwing body in a pit latrine - appeal against conviction and sentence of 7 years – ingredients of the offence of infanticide – mandatory requirement to establish the state of mind of the accused person - whether the charge sheet as drafted was sufficient to establish the charge of infanticide - Penal Code, cap 63, sections 205, 210*

Brief facts

DPO died in infancy at 1 month and 10 days in the hands of his own mother, the appellant, who threw him in a pit latrine. Following the death, the appellant was charged with the offence of infanticide contrary to section 210 as read with section 205 of the Penal Code. The appellant pleaded guilty to that offence, was convicted and sentenced to a prison term of 7 years. Aggrieved by the sentence, the appellant commenced the appeal.

Issues

i. Whether a charge of infanticide that did not specifically elaborate on the state of mind of the accused person at the time of the commission of the offence was sufficient for a conviction.

Relevant provisions of the Law

Penal Code, cap 63

Section 210

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 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.

Held

1. An essential element of the offence of infanticide was 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 ought to prove, *inter alia*, the requisite disturbance of the mind.
2. In the present case, it was not clear whether or not the accused person was subjected to a mental assessment. Had her conviction been reached at after a full trial, then the conviction on the offence of infanticide would have been unsafe for lack of proof of the disturbance of mind. Without that proof then another offence, perhaps, murder or manslaughter would be disclosed.
3. Given the definition of the offence in section 210 of the Penal Code, the particulars of the offence lacked some essential elements. The appellant was charged with unlawfully killing the infant. An essential element of a charge of infanticide was that the accused by willful act or omission caused the death of the infant.
4. The particulars of the offence did not state that the appellant's balance of 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. The state of mind of the accused at the time of commission of the offence was critical. It did not help that in reading out the facts after plea had been taken, the prosecution failed to state the appellant had suffered such mental disturbance at the time of the commission of the offence.
5. The particulars of the offence were so wanting in the essential elements of the offence of infanticide that the appellant answered to a charge other than the offence of infanticide. The facts read out by the prosecutor only served to compound the weakness in the charge. The present case was one of those instances where a court was entitled to interfere with a conviction reached on the accused's own plea of guilt.
6. The trend in other jurisdictions (e.g. in the United Kingdom) was that offences of infanticide were met, invariably, with a non-custodial penalty on the rationale that such offenders generally required treatment and probation but with the usual caveat that each case ought to be considered on its own special circumstances. For the reason that the appellant had served a custodial sentence which could very well had not been the appropriate sentence even if she had been properly convicted, there would be no order for a retrial.

Appeal allowed.

Orders

i. *Conviction quashed and sentence set aside.*
ii. *The appellant was released.*

Citations

Cases

Kenya

Mwau, Mwelu v Republic Criminal Appeal 15 of 2013; [2015] KEHC 851 (KLR) - (Explained)

United Kingdom

1. *Kelly & another v Republic* [2003] EWCA Crim 2957 - (Explained)
2. *Regina vs Lisa Therese Gore (Deceased)* [2007] EWCN Cr 2789 - (Explained)

Statutes

Kenya

Penal Code (cap 63) sections 210, 205 – (Interpreted)

United Kingdom

Infanticide Act 1938 [UK] section 1(1) – (Interpreted)

Advocates

None mentioned

JUDGMENT

1. DPO died in Infancy. His death, sadly and tragically, was in the hands of his own mother, PAO (the appellant). Following that death, the appellant was charged with the offence of infanticide contrary to section 210 as read with section 205 of The *Penal Code*. The appellant pleaded guilty to that offence, was convicted and sentenced to a prison term of 7 years. Aggrieved with the sentence, the appellant commenced the present Appeal.

2. Infant D was 1 month and 10 days when his mother threw him down a pit latrine. He did not survive it and a Post Mortem examination conducted on him revealed that the likely cause of death was suffocation in an area of law oxygen tension. This unfortunate incident had been precedented by a telephone call by the husband to the appellant in which he accused the appellant of getting infant David out of wedlock. He asked her to care and be responsible for the child. That may have distressed the appellant.

3. At the hearing of the appeal, the state counsel was unable to support the conviction in the first place and requested this court to interfere with it. Counsel referred this court to the decision in *Elizabeth Mwelu Mwau vs Republic* [2015] eLKR in which Nyamweya J, held;

> I therefore agree with the appellant that the facts do not disclose the offence of killing an unborn child, and that the appropriate charge should have been that of infanticide. This is for the reason that the general state of health and mind of women who kill their children during or shortly after birth, may be such that it negates the degree of intention and willfulness that is required with other forms of destruction of life, and which fact is recognized in the offence of infanticide.

4. Section 210 of The *Penal Code* provides:-

> 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 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

An essential element of the offence is that the mind of 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.

5. In the matter at hand it is not clear whether or not the accused person was subjected to a mental assessment. And had her conviction been reached after a full trial then the conviction on the offence of Infanticide would have been unsafe for lack of proof of the disturbance of mind. Without that proof then another offence, perhaps, murder or manslaughter would be disclosed.

6. Here, however, the conviction was on the basis of the Accused persons own plea of guilty. That is of significance. It is even more significant that the appellant does not challenge the conviction. In the case of *Kelly & another Vs Republic* [2003]EWCA Crim 2957, Lord Justice Rix quoted the decision in R v Bhatti (CACD) in which Lord Justice Potter said,

> "Thus once the defendant has pleaded guilty and been sentenced on the basis of his plea, it will only be in the rarest of cases that circumstances should be regard as vitiating or undermining the voluntary nature of the plea to such an extent that the conviction should be regarded as unsafe."

This court must therefore be slow in interfering with the conviction unless it vitiated for overt reason.

7. The charge read out to the appellant was as follows:

> Charge: Infanticide contrary to section 210 as read with section 205 of the *Penal Code*.
>
> Particulars: Pauline Auma Oduor on the 25th day of December 2014 at Kadeke "A" village in Nasewa location within Busia County, unlawfully killed David Paul Oduor a child under the age of twelve months.

8. Given the Definition of the offence in section 210 (see paragraph 4 hereinabove), the particulars of the offence lacked some essential elements. The appellant was charged with "unlawfully killing" the infant. An essential element of a charge of Infanticide is that the accused "by willful act or omission" causes the death of the infant. Discussing section 1(1) of the *Infanticide Act 1938* (of England) which in similarity would, The Court of Appeal of England in *Regina vs Lisa Therese Gore (Deceased)* [2007] EWCN Cr 2789 observed:

> If the criteria in sub section (1) are fulfilled, the mother who kills her child does not have to face an indictment for murder. She faces a lower grade criminal charge, namely infanticide. The mens rea for the offence of infanticide is contained, as we see it, explicitly in the first few words of section 1(1), namely the prosecution must prove that the defendant acted or omitted to act willfully. There is no reference to any intention to kill or cause serious bodily harm. Mr. Webster acknowledges that on his version of the section the word "wilful" would be superfluous. The "willful" was not superfluous in the Children and Young Persons act

> 1933 and to our mind, it was not superfluous here. It is from the word "wilful" that one derives the necessary mens rea for the offence of infanticide. As to the meaning of the phrase "notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder". (my emphasis)

The appellant was made to answer to a charge that excluded the *mens rea* for the offence. And if it is argued that the use of the words "unlawfully killing" somewhat moderated this deficiency, there is yet another defect in the charge.

9. The particulars of the offence did not state that the appellant's balance of 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. It earlier observed, the state of mind of the accused at the time of commission of the offence is critical. It did not help that in reading out the facts after plea had been taken, the prosecution failed to state the appellant had suffered such mental disturbance at the time of the commission of the offence.

10. It is my view that the particulars of the offence were so wanting in the essential elements of the offence of Infanticide that the appellant answered a charge other than the offence of Infanticide. I also hold that the facts read out by the Prosecutor only served to compound the weakness in the Charge. I have to reach a decision that this is one of those instances where a Court is entitled to interfere with a conviction reached on the Accused's own plea of guilt. For this reason I would quash the conviction and set aside the sentence imposed. What order should follow?

11. The trend in other jurisdictions (e.g. in the UK) is that offences of Infanticide are met, invariably, with non-custodial penalty on the rationale that such offenders generally require treatment and probation. But with the usual caveat that each case must be considered on its own special circumstances. For the reason that the appellant has served a custodial sentence since January 12, 2015 which may very well not have been the appropriate sentence even if properly convicted, I will not order a retrial.

12. The appellant is hereby released forthwith unless held for some other lawful reason.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 19TH DAY OF MAY 2016.

F. TUIYOTT

J U D G E

In the presence of:-

.....C/Assistant

.....for the Appellant

.....for the State