



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 38 OF 2015

J A N ----- APPELLANT

VERSUS

REPUBLIC -----RESPONDENT

***(Appeal against sentence by Hon. Washika Wachira Senior Resident Magistrate in Busia CM
Criminal Case No. 1920 of 2015 meted on 25.8.2015)***

JUDGMENT

1. This Appeal by Judith Anyango Ndeda (The Appellant) against sentence has, quite unlikely, led this Court to consider the welfare of the victims of her crime.
2. The victims of the crime by the Appellant are her own children, EA N and WAN. The Appellant and her husband (GON) were charged on 2 counts of the Offence of causing Grievous Harm Contrary to Section 234 of the Penal Code. The Particulars being;

Count 1: On the 19th day of August 2015 at Siteko village, within Busia County, JAN and GON jointly unlawfully did grievous harm to E A N

Count II: On the 19th day of August 2015 at Siteko village within Busia County, J A N and G O N jointly unlawfully did grievous harm to W A N.

The Appellant was convicted for both counts on her own Plea of Guilty.

3. After conviction the Court sentenced the Appellant to imprisonment of 4 years on each count. The sentences to run concurrently. The victims sustained serious injuries and the crime was needless. Ordinarily, the sentence imposed was appropriate and there would be no reason for this Court to interfere with it.
4. However, the Proceedings after the sentence caught the attention of this Court. This is what transpired;

Accused:

I pray for exhibits to use them in second Accused. I wish to apply the minor to be remanded at the end times children home. There is also another Younger last born. All to be remanded at the end times children home.

Court:

The 3 children to be remanded at the end times children home for the sake of their best interest.

Right of Appeal in 14 days.

R.M. WASHIKA WACHIRA-SRM

25.8.2014

I have looked the handwritten proceedings of the magistrate and noted an error in the typed proceedings. The person who addressed the Court was the State Counsel and not the Accused Person.

5. Following the Custodial sentence, her three children needed to be taken in at a Children's Home. Of the three, two were Victims of the offence. This Court felt it necessary to inquire into the effect of the sentence on the welfare of The Victims.
6. In doing so the Court was alive to provisions of The Victim Protection Act (Act No. 17 of 2014). The Statute is an Act of Parliament to give effect to Article 50(9) of The Constitution which provides as follows:-

(9) Parliament shall enact legislation providing for protection rights and welfare of victims of offences

7. Two Objects and Purposes of The Statute are Prevention of Re-victimization of Victims in the Justice Process and Restorative Justice in appropriate cases (see Section 3 of the Act). Aware of these objects and attentive that the Victims of the offence were children and therefore their best interests was of paramount significance in the manner in which the Justice Process left them, this Court made its Orders of 25th February 2016.
8. Then, I remarked and ordered as follows:-

The sentence of 4 years on each count to run concurrently would ordinarily be an appropriate sentence given that the victims sustained serious injuries and the manner in which they were caused was cruel. However, this Court is concerned about the Best Interest of the 3 minor children. They are currently at a Children Home and living away from their mother. Before considering the matter any further, I direct that the Children Officer, Busia do visit the three Children and report to the Court, inter alia, on the welfare of the Children and their attitude towards their mother. The Children's Officer should also interview the Appellant and find out inter alia, whether she is in a frame of mind and position to take back the children. The Children's Officer should also interview members of the extended family and Community. The Officer should make any observation that may enrich the decision of this Court. Further, I direct the Probation Officer Busia County to prepare a Social Background Report of the Appellant and the victims. Further the Probation Officer Busia County to prepare a Social Background Report of the Appellant and the victims.

9. On 7th March 2016, The Court received a Probation Report. The Probation Officer observed, inter alia,

The offender did admit committing the offence out of rage, an offence which she deeply regrets. She is seeking for leniency from the Honourable Court. Immediate and extended family members gave positive views of her. They stated that the offender may have acted out of anger and has since learnt her lesson in the period she has been in custody. The young victims who are her children were also interviewed They pleaded to be reunited with their mother as they are currently being taken care of by different relatives hence hardly see each other. They have since forgiven their mother and are praying for her release.

The Report recommended that the Appellant be released on Probation.

10..The Children Officer filed her Report on 8th March 2010. What was the Victims attitude towards the offender? Both Children regret angering their mother and leading her to commit the offence and both miss her and desired to be reunited with her. As for the Appellant, the Report stated:

We interviewed J A N. She regrets the act that she committed against her own children. She said more than once that she regrets taking an action against her children in anger and that she has learnt a tough lesson from it.

Judith pleaded for leniency and wished that she is placed on a non-custodial sentence so that she can be able to attend to her family whom she knows are suffering in her absence.

Judith promises that if she is released from custody she is ready to abide by all the terms of release just so long as she can be able to see her children.

11. Reading the two Reports, it seemed clear to me that the best interests of the two minor children was to reconcile and reunite them with their mother. It would also be in the interests of the Victims if they were to be brought up under the love and care of their mother. This view, going by the contents of the report, had the support of the relatives of the victims and the Community. Motivated by the unique circumstances of this case, the Court interfered with the Custodial sentence and set it aside. In its place the Court ordered as follows:-

- i. The Appellant be placed on Probation for a period of 24 months with effect from 9th March 2016.
- ii. The Children Officer Busia Sub County shall make family visits every 60 days and make Quarterly Reports to the Trial Court.

Dated, signed and delivered at Busia this 16th day of May 2016.

F. TUIYOTT

J U D G E

In the presence of :-

Orwasa- C/Assistant

N/A -for the Appellant

Owiti - for the State