REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 74 Of 2016.

C M W…..……..…..……APPELLANT

VERSUS

REPUBLIC ……..……RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at

Milimani Children's Court Cr. Case No. 576 of 2014 delivered by Hon. L.Gitari on 20th April, 2016.)

JUDGMENT

BACKGROUND.

The Appellant, C M W was charged with committing cruelty to a child contrary to Section 127(1)(a) of the Children Act No. 8 of 2001. The particulars of the offence were that on the 2nd day of September, 2014 at [particulars withheld] in Embakasi District within Nairobi County, being a custodian of N.G.N, a child aged 4 years, willfully assaulted the said N.G.N by beating her, an act that caused injuries to her health.

Pursuant to a plea agreement the Appellant was convicted on her own plea of guilty and sentenced to eighteen months imprisonment and a payment of damages for personal injury amounting to Kshs. 120,000/=. Being displeased with the decision of that court the Appellant has decided to lodge an appeal to this court. She was represented by learned counsel, Mr. Omari who submitted that the appeal was only against the sentence.

SUBMISSIONS.

The parties argued the Appeal by way of oral submissions made on 29th June, 2016. The Appellant was represented by Mr. Omari while the Respondent learned State Counsel, by Ms. Sigei.

Mr. Omari submitted that the Appellant was charged under Section 127 of the Children's Act which sets out the penalty as a fine of Kshs. 200,000/- with a default sentence but the trial magistrate only imposed a custodial sentence. He further submitted that under the provision, if the offence was of an aggravated nature, it would have been charged under the Penal Code; yet the magistrate observed the sentence was influenced by the seriousness and aggravated nature of the offence.

Counsel submitted that the Appellant had changed plea as it was service week for the judiciary and the

trial magistrate did not take this into consideration particularly as it promoted reconciliation and saved the court's time.

He further submitted that the court had not considered the Appellant's mitigation by which she said she had hit the child in the middle of a domestic argument and the blow that hit the child was intended for the husband. Further that the Appellant was very remorseful. She had taken the child in after it was abandoned by its uncles and since 2010 she had been taking care of the child and had always had the child's best interest. It was submitted that she was jobless and a mother and was ready to undergo counseling for the domestic abuse she suffered that made her react in the manner she did. He therefore urged the court to provide an alternative punishment. He relied on the cases of ***Philip Makhokha Keya v Republic[2014] eKLR and Mwenda Lugwe v State[2014] eKLR.***

On behalf of the Respondent, learned State Counsel, Miss Sigei opposed the appeal. She submitted that the sentence was not harsh or improper and that it was imposed in accordance with Section 127(1) of the Children Act. She submitted that the court had considered the mitigating and aggravating factors and tried to offer protection to the child who could not protect herself given her tender age and also with a view to the serious injuries she received.

Miss Sigei was of the view that the Appellant should have fought her husband in a location that did not endanger the child. Further that the damages as awarded by the trial magistrate were proper and legal under Section 23 of the Victims Protection Act. In any case, the Appellant pleaded guilty after she signed the plea agreement of her own accord which meant she understood the consequences of pleading guilty. She concluded by stating that the State had exercised discretion in charging under the Children's Act and not the Penal Code.

DETERMINATION.

It is trite that a conviction from a plea of guilty can only be challenged on the legality of the sentence as set out under Section 348 of the Criminal Procedure Code. The court has looked at the Appellant's submissions and it appears on the face of it that her argument was that the trial magistrate contravened Section 127 of the Children's Act in sentencing as she failed to exercise her discretion by failing to impose a fine. The said provision reads as under;

> ***"127.(1) Any person who having parental responsibility, custody, charge or care of any child and who-***
>
> > ***(a) wilfully assaults, ill-treats, abandons, or exposes, in any manner likely to cause him unnecessary suffering or injury to health (including injury or loss of sight, hearing, limb or organ of the body, and any mental derangement);***
> >
> > ***(b) by any act or omission, knowingly or wilfully causes that child to become, or contributes to his becoming, in need of care and protection, commits an offence and is liable on conviction to a fine not exceeding two hundred thousand shillings, or to imprisonment for a term not exceeding five years, or to both.***
> >
> > ***Provided that the court at any time in the course of proceedings for an offence under this subsection, may direct that the person charged shall be charged with and tried for an offence under the Penal Code, if the court is of the opinion that the acts or omissions of the person charged are of a serious or aggravated nature."***

The contention by the Appellant is that, in sentencing, the learned magistrate took into account the aggravating factors of the case. This meant that she assumed that the charge had been brought under the Penal Code. My view is that the magistrate had no control over the Statute under which the Appellant was to be charged. The legality of the charge was also not challenged. More importantly, the sentencing followed a plea agreement and in so imposing it the trial magistrate could not overlook the circumstances under which the offence was committed. This was clearly discerned from the evidence of the witnesses

who had so far testified before the plea agreement was executed.

The Appellant also contends that the trial magistrate did not take into account the various mitigating factors. In the trial, she said that she was remorseful and that it was an unfortunate incident. She further stated that she was in an abusive marriage and in the course of their fights the blows meant for her husband had fallen on the child. She further stated that she had taken care of the child since 2010 and in due course provided the child with medical care. She further asked the court to look at her hopelessness with regards to being jobless and a mother of a minor and as such sought a non-custodial sentence. She further stated that she would agree to counseling and would never go near the child.

In the Appeal, she relied on the same mitigating factors. In making a decision on this point, it is important that I look at the background of the case. *The prosecution's case was that the Appellant was committing acts of cruelty against the complainant, N.G.N. The complainant was in her care by virtue of her husband who was the child's biological uncle. The birth mother to the child had immigrated to the United States and had left the child in the care of her family members. The child had been moved around and eventually ended up with the uncle who was at that time living with the Appellant herein.*

The child had exhibited certain wanton signs of cruelty and when she was taken to Mater Hospital around the time of the charge she was losing consciousness and she was extremely adverse to the Appellant which led the hospital officials to conclude that the Appellant was in some way involved in the child's current state. They then took the child away from the family for her own good after they inspected her and found tell-tale signs of abuse. This included pinch marks and whip marks. They concluded that the child was suffering from battered child syndrome and informed the authorities of the same.

With regard to the ultimate injury that the child suffered, it is clear from the evidence of PW 5, PW4, PW3 and PW2 that the cruelty that befell the child was continuance and took various forms. The pinching in particular does not appear to constitute part of the domestic abuse and as was stated by PW4. The Appellant indicated that she pinched the child when she wet the seat. The abusive nature of a relationship should not be reason to condone cruelty. It cannot be said the sins of the father shall be visited upon the children. This does not, to this court, constitute a mitigating factor when looked at subjectively. Moreover, the medical evidence was that the head injury could not have been occasioned by the kind of a fall from a bed that the Appellant alluded to when the child was first taken to hospital.

The Appellant further stated that she had been taking care of the child since 2010. It is clear to see from the evidence that the complainant was left to the sister of the mother before being taken by PW4 and then later was sent to stay with the Appellant and her husband. This was from around August or September 2014. She stayed with them until, from a perusal of the record, 26th October, 2014 when PW4 took her away and took her to Mater Hospital for treatment after the serious head injury.

The learned magistrate properly considered the Appellant's mitigation, the fact that she was a first offender and that she had pleaded guilty. The court however contrasted this with the aggravating circumstances and rightly so settled at the sentence in question. Some of these factors are extremely regrettable and pathetic. From the evidence of PW3, a doctor from Gertrude's Children's Hospital the child suffered a brain damage that in fact had began to shrink. PW4, an uncle to the child and who had given the child to the Appellant and her husband testified that the hospital had to bar the Appellant from visiting the child in hospital as the child reacted negatively on seeing her. A combination of the evidence revealed that the injury suffered was not as a result of an accidental blow as alluded by the Appellant. I am convinced that she had continuously physically abused the child that culminated into nearly killing her. I think, in those circumstances, the sentence meted against her was not only reasonable but lenient.

Save for that fact that the sentence followed a plea agreement, this court would have been inclined to enhance it. It is trite that the trial court would also have opted to impose a fine, but the circumstances of this case do not warrant the variation of the sentence imposed. The custodial sentence will offer the Appellant an opportunity to rethink her responsibility over a child and fully shoulder the responsibility of her action which I can only describe as heinous.

The Appellant further stated that the award of damages was tantamount to a fine and meant that the sentence as set out was too harsh. Section 23 of the Victims Protection Act provides for the compensation awarded by the learned magistrate. Subsection 2(e) sets out compensation for costs of any medical or psychological treatment. In this case, it was clear that the child had undergone extensive medical care and was undergoing psychological treatment and physiotherapy after being discharged. The person responsible for all these expenses was none other than the Appellant. I do agree with the learned counsel for the Appellant as was observed in **Phillip Makhoha Keya vs Republic (2014)eKLR** that while sentencing is in the discretion of trial court, harsh sentences particularly in cases involving relatives may hamper reconciliation of family members. However, the instant case does not fall under this bracket notwithstanding that the child was related to the Appellant. The child was taken away from the Appellant while she was admitted in hospital and has since become a ward of the State. Further, in the pre agreement, it was agreed that the Appellant would never visit the child. The child's relationship with the Appellant has therefore been deciphered. This is a case I feel that a custodial sentence and compensation as ordered by the trial magistrate was deserved. I would not in the circumstances be inclined to disturb the sentence in any manner.

The upshot of my observations is that this appeal lacks merit and the same is hereby dismissed. The sentence imposed is confirmed. It is so ordered

Dated and Delivered at Nairobi this 19th Day of July, 2016

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in person.

2. Miss Kimiri for the Respondent.