



IN THE HIGH COURT OF KENYA

AT MURANG'A

CRIMINAL APPEAL CASE NO 2 OF 2012

(FORMERLY OF NYERI HC CR CASE 150 OF 2010)

(Appeal against Conviction and Sentence in Murang'a PM Criminal Case No 240 of 2009 – I K Orenge, RM)

P N M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant **P N M** was convicted after trial of **child neglect** contrary to **section 127(1) (a) & (b)** of the **Children's Act, No 8 of 2001**. It was alleged in the particulars of the offence in the charge that on 26/04/2009 at **[particulars withheld]** village in Murang'a District within Central Province he willfully abandoned his children, namely E N and D M, hence causing them to be in need of care and protection. He was sentenced as follows –

“The court will order that in the best interest of the children, the offender to pay monthly contribution of KShs 4,000/00 In default of any such payment the offender to be imprisoned for a period of four years. (Sentence to be enforced) through the Children's Department at Murang'a.”

He has appealed against both conviction and sentence. Learned Prosecution Counsel for the Respondent does not support the conviction.

2. The Appellant was charged in the same count under both paragraphs (a) and (b) of section 127(1) of the Children's Act. Those paragraphs provide -

“127. (1) Any person who having parental responsibility, custody, charge or care of any child and who –

- a. **willfully 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); or**
- b. **by any act or omission, knowingly or willfully 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”.

3. It is plain that paragraphs (a) and (b) of section 127(1) aforesaid create separate and distinct offences which are alternative to each other. A person cannot be charged with both in the same court. The charge as laid was thus fatally defective for duplicity. The conviction cannot stand.

4. The sentence imposed deserves a mention notwithstanding that the conviction will be quashed. The sentence provided for under section 127(1) aforesaid is a fine not exceeding KShs 200,000/00 or imprisonment for a term not exceeding 5 years, or both the fine and imprisonment. What the trial court imposed was a civil order, not the sentence provided for by the law for the offence. It was clearly an illegal sentence.

5. In the result the appeal is allowed in its entirety. The conviction is hereby quashed and the “sentence” imposed set aside. It is so ordered.

DATED AND SIGNED AT MURANG’A THIS 25TH DAY OF JUNE 2015

H.P.G.WAWERU

JUDGE

DELIVERED AT MURANG’A THIS 26TH DAY OF JUNE 2015