



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 229 OF 2013

JACKLINE KHAUMBIAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

1. The Appellant herein, **JACKLINE KHAUMBI** pleaded guilty to the charge of Infanticide contrary to Section 210 as read with Section 205 of the Penal Code.
2. She was convicted on her admission of the offence and sentenced to life imprisonment.
3. The Appellant then preferred an appeal on the sentence and preferred the following grounds:-

“(a) THAT I pleaded guilty to the charge hence praying for leniency.

(b) THAT I be treated as a first offender and your lordship the sentence imposed on me is rather on the higher side.

(c) THAT I am a single mother and was the sole bread winner to my little family.

(d) THAT I have an infant baby whom is left to be taken care of by my grandmother who is very old after my husband abandoned me. Now my long term imprisonment is a frontier to them thus becoming a burden to the community.

(e) THAT I am apologetic, remorseful and repentant hence praying that may this honourable court consider my mitigations and give me a second chance since I believe in the wise saying that once bitten twice shy and I promise to be a good citizen and learn from this ignorant and highly regrettable mistake.”

4. When the appeal came up for hearing, the Appellant in her submissions challenged the guilty plea and alleged that she never intended to kill the foetus but it so happened when a midwife one Elizabeth gave her some local herbs when she complained of some stomach pains.
5. Although the appeal is primarily on the sentence, I have taken the liberty of revisiting how the plea was taken. I have perused both the hand-written proceedings as well as the typed ones and going by the guidance in the case of ***Adan -vs- R***, I am satisfied that the trial Court properly took the plea and the Appellant was properly convicted and sentenced.
6. On the issue of sentence, I have noted that the trial magistrate handed down life imprisonment and in

doing so made the following remarks:-

“The offence is serious the accused person seems not to be remorseful and I do sympathize with her situation but as a lesson to the rest, the law gives me no option but to sentence her to life in prison, The Accused is hereby convicted with the offence on her plea of guilty and hereby sentenced to life imprisonment. Right of appeal 14 days.”

7. Pursuant to **Section 210 of the Penal Code, Section 205** presents the sentence for offence of infanticide and is tailored as follows:

“205. Any person who commits the felony of manslaughter is liable to imprisonment for life”
(emphasis added).

8. The words ‘***is liable to imprisonment for life***’ simply means that once convicted of the relevant offence such a person may be sentenced upto life in prison. **Section 205** of the Penal Code therefore does not prescribe a mandatory sentence but gives the sentencing Court a latitude of discretion depending on the circumstances of the case.

9. I therefore and with utmost respect find that the Learned Magistrate misinterpreted Section 205 of the Penal Code to mean a mandatory life sentence. He therefore fell in error. That is however not to say that the sentence of life imprisonment was unlawful; it remains lawful but is not the only sentence mandated in law for the offence of infanticide.

10. The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act in dealing with an appeal on sentence. The appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not take into account a relevant fact or that it took into account an irrelevant factor that or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and as long as the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

11. The Appellant's contention in the appeal is that the sentence was harsh and excessive given that she had pleaded guilty to the offence, was a first offender and had rendered mitigations. It remains a cardinal principle of sentencing that the sentence imposed should be fair and proportionate and in so far as possible the same facts should attract the same sentence.

12. From the foregone and taking into account that the trial Court erred in interpreting the law on sentencing, I find that there are sufficient grounds for this Court to intervene. I do so and set aside the life imprisonment imposed upon the Appellant.

13. Looking at the nature of the offence and the circumstances surrounding its commission, I find that a sentence of two (2) years imprisonment would be sufficient. As the Appellant was sentenced on 5th June 2013, she has therefore been in custody for well over 2 years by now.

14. The upshot is therefore that the appeal succeeds to the extent of substitution of the life sentence with two (2) years imprisonment term and since the Appellant has been serving the life sentence since her conviction, I find that the sentence of 2 years is well served and I hereby order that the Appellant be set at liberty unless otherwise lawfully held.

Dated and SIGNED at MIGORI this 13th day of October, 2015.

A. C. MRIMA

JUDGE

DATED, COUNTERSIGNED and DELIVERED at KAKAMEGA this 12th day of November, 2015.

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JUDGE