REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 15 OF 2013

ELIZABETH MWELU MWAU……..……APPELLANT

VERSUS

REPUBLIC……...……..……RESPONDENT

(An appeal arising out of the judgment and sentence of Hon. H. Nyakweba PM in Criminal Case No. 16 of 2013 delivered on 20th February 2013 at the Principal Magistrate's Court at Kilungu)

JUDGMENT

The Appellant has appealed against her conviction and sentence of twenty (20) years imprisonment by the trial Court. The Appellant was charged in the trial Court with the offence of killing an unborn child contrary to section 228 of the Penal Code. The particulars of the offence were that on the 13th day of January 2013 at Kilome sub-location, Mukaa location in Mukaa District within Makueni County, the Appellant when she was about to deliver a child prevented it from being born alive by killing it and secretly disposing the body by dumping in a pit latrine.

The Appellant was arraigned in the trial Court on 20th February 2013 and she pleaded guilty to the charge. The court convicted the Appellant of the offence on her own plea of guilty, and sentenced her to twenty (20) years imprisonment. The Appellant is aggrieved by the judgment of the trial magistrate, and has preferred this appeal against the conviction and sentence. The grounds of appeal are in a Petition of Appeal dated 5th March 2013 and filed in Court on the same date.

The main grounds of appeal are that the plea was not unequivocal; the language used during plea was not understood by the Appellant; the facts as presented to the court did not disclose any offence having been committed by the Appellant under section 228 of the Penal Code; there was no confession made by the Appellant; the Prosecution exhibits 1 and 2 were not relevant to the case; the Appellant was arraigned in court outside the duration allowed by the law; and that the sentence was excessive and manifestly harsh.

The Appellant's Advocate, J.N. Kimeu Advocate, filed submissions dated 19th June 2015, wherein the grounds of appeal were reiterated, and it was contended that the facts presented to the Court were at variance with the charge, and disclosed the offence of infanticide. It therefore followed that the sentence meted out on the accused was not only harsh but illegal.

The Prosecution Counsel, Mr. Cliff Machogu filed submissions dated 15th October 2013 in opposition to

the appeal. It was argued therein that the charge sheet was not defective and that the facts as read to the Appellant revealed that indeed an offence had been committed under section 228 of the Penal Code. Further, referring to the case in **Adan vs R, (1973) EA 445,** it was stated that the charges had been read to her in Kikamba, a language she understood. The counsel noted that although the Appellant responded in Kiswahili the court had an obligation to record her response in the language that she pleaded with. Reference was made to section 207(2) of the Criminal Procedure Code in this regard. Finally, it was submitted that sentence was illegal as the act provided for life imprisonment upon conviction.

The prosecution presented the facts of the case as follows. The Appellant had been employed as a house help in Kilome. In the month of December 2012 her employer suspected her to be expectant, and that on 13th January 2013 at around 6.00 a.m. the Appellant delivered a baby female in the kitchen and immediately after birth tied a polythene bag around the neck, put it in a gunny bag and dumped it in the neighbour's pit latrine. The Appellant then continued with her duties as normal.

Her employer suspected that the Appellant had given birth after entering the kitchen and noting blood stains therein, and had called the Appellant's mother. Upon interrogation by her mother, the Appellant conceded to the fact of the delivering the baby and dumping it in a neighbor's latrine. The Assistant Chief was then informed and they retrieved a sack from the pit latrine and found the body of a female baby inside. The matter was thereupon reported to the police, and the Appellant was later examined at Kilungu sub-district hospital and found to have recently delivered a baby. The medical report was tendered as prosecution exhibit 1. Further, that a post-mortem of the baby was conducted and it was found that the cause of death was asphyxia from manual strangulation. A report of the same was also tendered as prosecution exhibit 2.

The Issues and Determination

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The three issues in this appeal are whether the plea of guilty by the Appellant to the offence of killing an unborn child contrary to section 228 of the Penal Code was unequivocal; secondly if so, whether the facts disclosed that the said offence had been committed; and lastly whether the sentence meted by the trial magistrate on the Appellant was harsh and illegal.

The procedure to be applied in taking a plea of guilty is well enunciated in the case *of* **Adan vs Republic, [1973] EA 445** where the Court held as follows:-

> ***"(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.***
>
> ***(ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.***
>
> ***(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.***
>
> ***(iv) If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.***
>
> ***(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded."***

The procedure as laid out in ***Adan vs Republic*** (**supra**) is also provided for under *section 207* of the Criminal Procedure Code.

In the present appeal, the record of the proceedings in the trial court indicates that the procedure employed at the time of taking of the plea by the Appellant on 20th February 2013 was as follows:

> "**The substance of the charge and every element thereof has been stated by the Court to the accused person in the language she understands, who being asked whether she admits or denies the truth of the charge replies "Ni ukweli".**
>
> **COURT: Plea of guilty entered"**

Further, the record showed that the interpretation was in Kamba language, and the facts as stated in the foregoing were then read out by the prosecutor and the Appellant stated that the facts were true and correct. The Court then convicted the accused on her own plea of guilty.

It is evident from the said record that the learned trial magistrate recorded the replies to the charge by the Appellant in her words. The Appellant's argument is that the record of the Court showed that she responded in Kiswahili language, and it was therefore not clear what the language of the Court was. The requirement in law is that the Court should use a language understood by the accused during the taking of a plea, and the Appellant has not alleged that she did not understand Kamba, which was the language used when the charge was read to the Appellant.

The Appellant was at liberty to respond in the language she was comfortable with, and the fact she chose to respond in Kiswahili only serves to show that she understood both the Kamba and Kiswahili language. Furthermore, the provisions of section 198(4) of the Criminal Procedure Code that provide that the language of a subordinate court shall be English or Swahili, are for the purpose of the conduct and recording of proceedings, and not for taking of the plea.

The procedure used up to this point by the trial Court therefore cannot be faulted. The next issue then to be determined is whether the facts as read out disclose the offence of killing an unborn child. Section 228 of the Penal Code provides for this offence as follows:

> **"Any person who, when a woman is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had then died, he would be deemed to have unlawfully killed the child, is guilty of a felony and is liable to imprisonment for life."**

The facts as recorded by the trial court on 10th August 2014 which were read to the Appellant at the time of recording of the plea of guilty are as follows:

> **"The accused person was house-help of Rebeccah Kasiwa within Kilome sub-location. In the month of December 2012, the employer noted physical changes on her person and started monitoring her. She suspected that she was expectant. On 13/1/2013 at around 6.00 a.m. the accused person delivered a baby female in the kitchen. Immediately after birth, she tied a polythene bag around the baby's neck, put her into gunny bag and dumped it in a neighbours pit latrine. She then continued with her duties as normal. When her employer entered the kitchen she noted some blood stains all over the place. She suspected that the accused had given birth. She started searching for her. When she returned, the employer detected that her appearance had changed. The employer then called the accused mother who came and upon interrogation, she conceded that she had indeed delivered and dumped the baby in a neighbours pit latrine. They summoned the village manager who in turn informed the assistant chief. They then retrieved a sack from this latrine and in it found a body of a female baby. They then escorted the accused person to the Kilome Police Station and handed her over together with the body which was preserved at the Kilome funeral Home to await post mortem. The accused person was escorted to the Kilungu Sub-District Hospital for examination. Upon examination by a medical officer of Health, she was found to have recently delivered. This report was accordingly prepared on 15/2/2013 (P. Exhibit 1). A post mortem of the baby's body was also conducted by Dr. Fredrick Okinyi of Machakos Level 5**

Hospital who found the cause of death to be asphyxia from manual strangulation. He prepared this report dated 15/1/2013 (P. Exhibit 2). The accused person was accordingly charged."

The offence of killing an unborn child makes it a criminal offence for a person to intend to destroy the life of an unborn child capable of being born alive by unlawfully using any means to achieve this result. Section 214 of the Penal Code in this regard provides as follows as to when a child is deemed to be a person capable of being killed:

"A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not, and whether the navelstring is severed or not. "

The offence of killing an unborn baby therefore only deals with acts intentionally performed before or during childbirth where the entire body of the child has not left the body of the mother, and there is thus an overlap of this offence with abortion related offences. However there may be other cases where a person intentionally and willfully prevents unborn child from being born, for example by intentionally killing a viable fetus following an assault on a pregnant woman.

However, if a child is born alive and is independent of the body of the mother and is then killed, then a person can only be charged with the offence of murder, manslaughter, or infanticide. In the present appeal the facts indicate that the child was indeed born and left the body of the mother, and was then strangled by the Appellant. The post mortem report produced by the prosecution as exhibit 2 showed that the child was a 1 day old child who was mature with normal bodily systems, and whose cause of death was asphyxia from manual strangulation, indicating the baby was alive and breathing at the time of the said strangulation.

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. The elements of the offence of infanticide are provided under section 210 of the Penal Code as follows:

"Where a woman by any wilful 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 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, 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."

From the provisions of the said section it is also imperative that such a woman should undergo the required psychiatric and medical examinations, to establish her state of mind at the time of commission of the offence.

On the last issue as to the legality of the sentence meted on the Appellant, the sentence for infanticide is that applicable to manslaughter, which under section 205 of the Penal Code is a maximum of life imprisonment, and which is the same sentence for killing an unborn child under section 228 of the Penal Code. Therefore the sentence meted out on the Appellant was not manifestly illegal if the charge and conviction is to be substituted with that of infanticide. However, I have taken into account the facts that the Appellant did not undergo any psychiatric examination to establish her state of mind at the time of the offence, and that she was sentenced on 20th February 2013 and has served two years and 10 months of her sentence. I am therefore of the opinion that the sentence the Appellant has served is enough punishment, and that she has had adequate time to reflect on her actions, so as not to repeat the same again.

In the circumstances I allow the Appellant's appeal to the extent of quashing the conviction of the Appellant for the offence of killing an unborn child contrary to section 228 of the Penal Code, and substituting it with, and convicting the Appellant for the offence of infanticide contrary to section 210 of the Penal Code. The sentence for this offence shall be the time served by the Appellant. I accordingly order that the Appellant be and is hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED AND SIGNED AT MACHAKOS THIS 8th DAY OF DECEMBER 2015.

P. NYAMWEYA

JUDGE