REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL CASE NO. 97 OF 2011

MARY JUMA GILBERT DEYA ……APPELLANT

VERSUS

REPUBLIC ……..…….. RESPONDENT

(From original conviction and sentence in Criminal Case Number97 of 2011 in the Chief Magistrate's court at Kibera before G.L. Nzioka (SPM) on 28th January, 2011)

JUDGMENT

The appellant Mary Juma Gilbert Deya was charged three offences. In count 1 she was charged with the offence of child stealing contrary to Section 174 (1) (b) of the Penal Code with. It was provided in the particulars of the charge that on 10th September, 2005 at Kenyatta National Hospital Nairobi jointly, with others not before the court with intent to deprive an unknown parent or guardian the lawful charge of unnamed child alias BABY "A" a child under the age of fourteen years of the possession of the said child, harboured the said unnamed child alias BABY 'A' knowing him to have been so taken, detained or enticed away.

In count II she was charged with the offence of giving false information to a person employed in the public service contrary to Section 129 (a) of the Penal Code. The particulars provided that on 10th September, 2005 at Kenyatta National Hospital Nairobi she informed Doctor James Kiarie the Head of Department Of Obstetrics And Gynaecology, a person employed in the public service, that she had delivered one unnamed child alias BABY 'A' outside Nairobi hospital which information she knew or believed to be false intending thereby to cause or knowing it to be likely that she would thereby cause the said Doctor James kiarie to investigate the said birth, which the said Doctor James Kiarie ought not to have done if the true state of facts respecting which such information was given had been known to him.

In count III she was charged with giving false information to a person employed in the public service contrary to Section 129 (a) of the Penal Code. The particulars provided that on 10th September, 2005 at Kenyatta National Hospital Nairobi, she informed Doctor James Kiarie a person employed in the public service that she had delivered a placenta at Nairobi Hospital immediately after the birth of the unnamed child alias BABY "A" outside Nairobi Hospital which information she knew or believed to be false intending thereby to cause or knowing it to be likely that she would thereby cause the said Doctor James Kiarie to call for the said placenta which the said doctor ought not to have done if the true state of facts respecting which such information was given had been known to him.

The appellant denied all the three offences but after a full trial she was convicted and sentenced to serve three years imprisonment on count I, two years imprisonment on count II and two years imprisonment on count III. The sentences were ordered to run concurrently.

Aggrieved by the said conviction she lodged this appeal. In her petitition of appeal she has raised several grounds the summary of which is that there was not sufficient evidence to sustain the conviction, that there was no credible complainant, that there was not sufficient evidence tendered to establish the ingredients of the charges and that her defence controverted and dented the prosecution evidence. Finally, that the learned trial magistrate entertained extraneous considerations which were not before the court.

On 6th December, 2011 following an application for bail pending appeal, Ochieng J, having been persuaded that the appellant had an arguable appeal, granted her bail pending the hearing of this appeal. The appeal was argued by way of written submissions on behalf of the appellant and the respondent. Both counsel have cited some authorities. I have read the submissions and the cited cases and in the event I do not make specific references to the said cases, that should not be construed to be wanting in substance.

My first observation is that the appellant was represented throughout the trial by advocates with no mean experience. The evidence adduced before the learned trial magistrate Mrs. G. L. Nzioka (as she then was) showed that the appellant went to Nairobi Hospital on 10th September, 2005 at about 12.30 a.m. in a taxi and received by P.W. 6 Mary Wanjiru Gatune, a nurse at Nairobi Hospital. The appellant gave a short history saying she had delivered where upon she was taken to the emergency room.

P.W. 6 examined her and noted that her breasts were soft and could not also feel her uterus like someone who had delivered. She called the doctor who took over. The doctor wanted to admit her but since the appellant did not have money she asked to be transferred to Kenyatta National Hospital which was done.

Dr. James Njogu Kiarie P.W. 1 went to see the appellant at 7 a.m. following the night of her admission. The appellant told the doctor that she had delivered on the road side next to Nairobi Hospital at 3 a.m. and walked to Nairobi Hospital with the assistance of a good Samaritan where she delivered the placenta at Nairobi hospital casualty. P.W. 1 examined the appellant on the abdomen but could not feel the uterus.

He also asked for laboratory tests to be done which included a pregnancy test which is expected to be positive after delivery but was found to be negative. The blood group of the appellant was AB + while that of the baby was A+. The placenta was taken for DNA testing. He concluded that the patient was not the mother of the baby. He thereafter asked the police to be contacted.

It also emerged that one Doctor Wanjala who gave evidence in the trial as P.W. 5 and who was Doctor Kiarie's colleague at Kenyatta National Hospital examined the appellant at his private clinic in May 2005 claiming to be pregnant and wanted to be admitted at Kenyatta National Hospital so that labour could be induced.

Dr. wanjala ruled out any pregnancy as at the time the appellant consulted him. After the police took over the case, investigations discounted the allegation of the appellant that she had given birth hence the charges against her.

In her defence given by way of unsworn statement the appellant told the court that on 8th September, 2005, she experienced some pain while shopping at Nakumatt where some rain caught up with her until 10.30 p.m. She then took a taxi to hospital but before she reached she gave birth to a child in the taxi. When they reached Nairobi Hospital she was allegedly examined while inside the taxi and later wheeled into the hospital. The placenta was cut off. She was then injected to stop bleeding and put on the drip. She gave her name and asked to pay Kshs. 75,000/= to be admitted.

Since she did not have the money, she was asked if she had a Kenyatta National Hospital card. She was then transferred to Kenyatta National Hospital where she was admitted and examined. On the following day at about 10 a.m., police officers came and found her sleeping with the baby whereafter she was arrested and the child taken to the nursery.

The learned trial magistrate believed the evidence of the prosecution witnesses and convicted the appellant. In convicting the appellant learned trial magistrate said in part as follows,

"As regards this case I find that indeed there is no direct evidence that anyone saw the accused steal the child in question. However, from the analysis of the witnesses evidence as aforesaid, and the DNA result having proved the accused is not the biological mother of the subject child what other inference can be drawn? That the accused is the mother or not, that she gave birth or stole? The next question is, is the offence of theft proved without the owner or claimant of the child? Is deprivation proved?"

The learned trial magistrate then cited Section 111 (1) of the Evidence Act and concluded that if the appellant alleged to have given birth, she had the duty to prove that allegation. This is because she had the full facts or knowledge of such an allegation and therefore going by the provisions of the said section, the burden of proof was upon her.

After analyzing the evidence the learned trial magistrate concluded that, the mere fact the child had been found not to belong to the appellant biologically was enough proof it was not hers. She therefore gave false information that she delivered on 10th September, 2005 and presented a placenta which did not match her blood group.

As the first appellate court, it is my duty to go through the entire evidence adduced before trial court and arrive at independent conclusions. The offence of child stealing is recognized by law and specifically provided in Section 174 of the Penal Code. The learned counsel for the appellant has dwelt substantially on the variance of the particulars of the charge in relation to the evidence adduced. My assessment of the entire trial is, whether or not the appellant stole the subject child and whether or not she gave false information as alleged. If the offence of stealing is proved beyond reasonable doubt the location would take a secondary seat.

The examination by P.W. 6 the nurse at Nairobi hospital and by P.W. 1 Doctor James Kiarie at Kenyatta National Hospital proved scientifically beyond any reasonable doubt that the appellant did not give birth to the subject child. This was reinforced by the DNA results.

The government analyst P.W. 8 John Kimani Mungai was asked to examine several items to generate DNA profiles which he did. After his tests he concluded that the appellant is excluded as the biological mother to the baby and owner of the placenta. Some pregnancy tests were made by doctors who had relocated. They included some by Dr. Edward Matu who could not be found during the trial. These were produced P.W. 15 Dr. Luiz Lwai Lume. In her evidence the doctor said she had worked with Dr. Matu for a few months but was familiar with his signature. The learned trial magistrate received the said documents cautiously but that did not diminish the weight of such evidence especially so when considered alongside the evidence of P.W. 1 Dr. Kiarie.

The evidence of P.W. 5 Dr. Samson Wanjala stands out as instructive. According to this doctor sometime in the month of May 2005 the appellant visited his clinic at Utalii house and told him she was pregnant. She wanted to be admitted at Kenyatta National Hospital Labour ward to be induced to deliver the baby. After examination however, the doctor concluded that she was not pregnant. Thereafter she never returned for any examination.

This is a doctor who concluded his evidence under cross-examination by stating **"I had no perceived opinion because medicine is medicine and a person is either pregnant or not pregnant."** I refer to the evidence of this doctor to observe that the appellant may have been laying ground for the eventualities she expected to achieve. When considered alongside what transpired at Nairobi Hospital and Kenyatta National Hospital, the appellant was just about to succeed. This in my view, was a classic example of tailoring of evidence to arrive at a pre drawn scheme. In this case, that the appellant was carrying a baby and that the delivery thereof could only be related to her as the mother of the child.

I agree that the evidence in this case is circumstantial. But circumstantial evidence is just as strong as direct evidence where the court is satisfied that there are no other co-existing circumstances to weaken that evidence. The circumstances of this case, the conduct of the appellant and the evidence of medical personnel conclusively referred to the appellant as the architect of these offences.

The complainant in this case is stated in the charge sheet as the Republic of Kenya through the Kenya Police Criminal Investigation Department. BABY "A" is a subject of the Republic. Notwithstanding the parent or guardian are unknown, that child is not stateless. I observed earlier the appellant was all along represented by counsel. Kenyatta National Hospital is a public institution. P.W. 1 Dr. James Kiarie is described as Head of Department of Obsteric and Gynaecology, a person employed in public service. The particulars were concise and clear. No objections were raised during the trial relating to the charge sheet and particulars thereof. To raise them now is an afterthought. In any case no prejudice can be said to have befallen the appellant in that regard.

I have no doubt in my mind that the appellant stole this child. That as a result to justify the end result she gave false information as stated in count II and III. The offences were proved beyond any reasonable doubt and the convictions were well founded. The sentences were also legal.

I have been asked to order that the sentences run consecutively but considering that the offences were committed in a running transaction, the learned trial magistrate was correct in ordering that they run concurrently.

I noted earlier on that the appellant was released on bail pending the outcome of this appeal. Having found that the learned trial magistrate was correct this appeal is dismissed and the bail terms vacated. The appellant shall now be committed to prison to serve the rest of her sentence.

Orders accordingly.

SIGNED DATED and **DELIVERED** in court this **22nd day** of May **2014**.

A.MBOGHOLI MSAGHA

JUDGE