EUNICE WANJA MAINA…….APPELLANT

-VERSUS-

REPUBLIC……..
….RESPONDENT

JUDGMENT

The Appellant, Eunice Wanja Maina was charged with the offence of **Child Neglect Contrary** to **Section 127(1) (2) of the Children's Act No. 8 of 2001**. According to the particulars of the offence, sometimes between the 3rd day of March 2012 and 3rd day of April 2012 at Mumbi estate in Murang'a County, the Appellant neglected her child namely Anastasia Njeri, aged one year and five months hence subjecting her to become a child in need of care and protection.

When the Appellant was arraigned in court on 4th April, 2012 she was convicted on her own plea of guilty. In her mitigation, the Appellant told the learned magistrate that it was not her intention to abandon her child without proper care. She said she had been engaged on casual basis at the survey offices in Murang'a town and had left the child under the care of an elderly woman whom she had been paying for her services.

Before sentencing the Appellant, the learned magistrate sought a report on the social state of both the child and the Appellant. Following the court's order, the Probation Officer, and the Children Officer both of Murang'a East District conducted independent social enquiries on the Appellant and the child and presented their separate reports to the learned magistrate. The reports had unfavourable information on the character and conduct of the Appellant. The Appellant was presented by the Probation Officer as a careless and reckless motherwho has a habit of abandoning her children; her first born child was allegedly abandoned with a stranger until the Appellant's mother came to the child's rescue. However this information seems to contradict the report by the Children Officer who said that indeed it was the Appellant's parents who asked for the child when it became difficult for the Appellant to maintain the two children. The Appellant's parents now live with the child and according to the Children Officer, they are ready and willing to take care of the Appellant's second child, despite their meagre means of livelihood. According to the Children Officer, chances of the Appellant abandoning the children again if released were very high. The Probation Officer was blunt in her recommendation that the court should not be lenient to the Appellant at all and should impose the maximum sentence available.

With the recommendations of these reports in mind, the learned magistrate sentenced the Appellant to pay a fine of Kshs. 50,000/= and in default to serve five (5) years in prison which is the maximum term provided under the law.

Although the Appellant had pleaded guilty to the charge against her, she appealed against both the conviction and sentence. In the Petition of Appeal, the Appellant has raised the following grounds:

1. "The learned magistrate erred in law and fact in convicting the appellant that she neglected her children while she is the only bread weaner(sic).

2. The learned magistrate erred in law and fact in not finding that the Appellant was a single mother who struggle single handedly to maintain and educate the single minors.

3. The learned magistrate erred in law in shifting the burden of proof on the accused. The Appellant did not understand the court charges properly to warrant conviction and sentence accorded to her.

4. The learned magistrate erred in law and fact in ignoring the applicant's mitigation and report provided/adduced in court.

5. The learned magistrate erred in law and fact in reaching a decision that was against the fair justice of the minors. The justice of the said minor/children cannot be realized by convicting the mother."

There is nothing on record to suggest that the Appellant was not in charge of her mind or faculties at the time she took her plea; neither has she suggested that she was influenced or induced to take her plea in any particular manner. She responded in the affirmative and confirmed as true the charge and the particulars of that charge when they were read to her in a language, which the record shows, she understood. The learned magistrate had no alternative in the circumstances but to enter a plea of guilty.

The only issue I am inclined to consider in this appeal is whether, considering the totality of the particular circumstances of this case including, the Appellant's plea of guilt and her mitigation the sentence of five years imprisonment in default of payment of a fine of Kshs. 50,000/ was severe. There is no doubt that the enquiry reports of the Appellant's and her children's background and social life social had a considerable influence on the severity or otherwise of the sentence meted out against the Appellant. I have no doubt that the reason the learned magistrate wanted the reports was to make an informed decision on the proper punishment that the Appellant deserved. I am inclined to re-evaluate at this appellate stage those same reports and make my own conclusions and determine whether the Appellant deserved a lesser severe sentence than the one meted out against her.

One aspect of the enquiry reports that caught my attention but which seems to have either have been overlooked or escaped the minds of both the learned magistrate in sentencing the Appellant and the Probation Officer in her recommendations is that the Appellant was at one point in her lifemarried to one John Waithaka; it is out of her marriage tothe said John Waithakathat the couple were blessed with the two issues one of whom was the subject of the criminal case against the Appellant.The two reports are clear and are in agreement that the marriage broke down solely because the Appellant had persistently been subjected to physical violence by her erstwhile husband. To escape from this cruelty, she was compelled to return to her parents with the two children. The reports indicate that she lived with her parents for a while before she moved out to live on her own. The reason given for her departure from her parents' home is mistreatment by her father, who is described as an alcoholic by the Probation Officer. As it were, fate seems to have conspired against the Appellant; things became worse on every turn (she made) until she ultimately found herself behind bars. Of course the unfortunate circumstances in which the Appellant found herself are, by no means reasons or excuses for breaching the law, and indeed the appellant never attempted to proffer them as such in her defence, but they are certainly mitigating circumstances which a court would consider in sentencing the Appellant.

While it is true that the appellant must bear the natural consequences of her actions or omissions, it is unfortunate that the only time that the father of the Appellant's children featured in the case was when he was identified as a man who was once the Appellant's husband. He does not feature anywhere else in the enquiry officers' reports particularly on the more important issue of maintenance of his children including the child that the appellant has been accused of neglecting.Is not the father equally, if not more, responsible for the welfare and wellbeing of his children? If it is true, as the enquiry officers' reports suggest, that out of desperation, the Appellant escaped with her children from a violent and cruel father, is he not equally culpable for child neglect?**Section 90(a)** of the **Children Act, 2001** is clear that it is the joint responsibility of both parents to maintain a child (or children as in this case) if he was or they were born during their marriage.

My conclusion is that if the reports by the **Children Officer** and the **Probation Officer** were crucial to

decision on the punishment meted out against the Appellant, and there is no doubt they were, then they should have been considered in their totality, wholesomely. Accordingly, had the trial court considered the reports in their entirety, it would have certainly meted out a less severe sentence. I would not sentence the Appellant without taking into account the circumstances of her marriage and more importantly that, under the law, she does not bear the sole responsibility of maintaining the children.For the foregoing reasons, I agree with the learned counsel for the state that the sentence meted out against the Appellant was out of proportion. Accordingly, I would allow the Appeal against the sentence of five years imprisonment in default of payment of Kshs. 50, 000/= and substitute it with a sentence of the term that the Appellant has served commencing 19th April, 2012. I order that the Appellant be released from jail unless she is otherwise lawfully held.

Judgement read and delivered in open court on the 25th February, 2013.

Ngaah Jairus
JUDGE