



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO.195 OF 2012

CONSOLIDATED WITH

CRIMINAL APPEAL NO.196 OF 2012

ESTHER WANJIKU.....1ST APPELLANT

MIKA KIBE.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Nakuru CM PCR. Case No.243 of 2012 Republic -vs- Mika Kibe& Esther Wanjiku by Hon. G. M. Mutiso – SRM delivered on 23rd October 2012)

JUDGMENT

1. The Appellants herein Esther Wanjiku and Mika Kibe were charged jointly with **child neglect contrary to Section 127 (1) (a) (b) of the Children’s Act No.8 of 2001.**
2. They pleaded guilty and upon conviction the court sentenced each to serve three years in jail.
3. The Appellants applied for bond which was granted in the following terms:
 - i. Bond of Ksh. 30,000/= and surety of the same sum.
 - ii. Attend before the Children Welfare Officer once a week.
 - iii. Attend hearing when the appeal is fixed for hearing.
4. The Appellants being aggrieved by the conviction and sentence preferred separate appeals and listed the following grounds in their petition of appeal summarised as follows:
 - i. That the learned Magistrate failed to provide an interpreter for the appellants or explain the nature of the offense to the appellants who were completely illiterate.
 - ii. That the learned Magistrate sentence of three years in prison was harsh and excessive and did not take into consideration the appellant children who needed parental care
 - iii. That the learned Magistrate misapprehended the Law and facts and arrived at an erroneous conclusion ignoring the fact that the child in question had always attended hospital whenever he fell ill.

5. At the hearing of the appeal, counsels for the Appellants and State made oral submissions.

Submissions by Appellant's Counsel

6. Counsel for Appellants chose to rely only on the first two grounds of appeal. He submitted that the Appellants were illiterate and may not have understood the language in which they were addressed i.e. Kiswahili. He also submitted that the sentence was excessive and manifestly unreasonable and that offences in the **Children's Act** should be dealt with having the best interest of the child in mind. However, in the instant case the interests of the children had not been taken into consideration and the purpose of the **Children's Act** was not met. Further, the appellants were 1st offenders and probation with supervision and counseling to enable them take care of their children would have been the best punishment.

Submissions by Respondents Counsel

7. Counsel for the State opposed the appeal on the grounds that the appeal should only be on sentence and not conviction as the Appellants had pleaded guilty. He submitted that the sentence was not excessive as the punishment under the **Children's Act Section 127 (a) and (b)** is for payment of a fine not exceeding Ksh.200,000/= or an imprisonment term not exceeding 5 years. The Appellants had been sentenced to 3 years, were non apologetic for the offence and they were out on bail. That the sentence of 3 years was affirming the rights of the Appellants Children and urged court to uphold the sentence.

Issues for determination

8. Upon consideration of the submissions made by the counsels, I find the following issues for determination:

- 1) Language
- 2) Sentence;

Analysis:

9. Under **Section 348 of the Criminal Procedure Code Chapter 75 Laws of Kenya** an appeal against sentence on a plea of guilty by an accused person may not be allowed except on the legality of the sentence.

10. Although this section puts a bar to an appeal on a plea of guilty, it has been held that the bar is not absolute. See **Ndede vs Republic (1991) KLR 567** in which the Court of Appeal observed:-

“There is a long line of authority to the effect that the bar to an appeal against a conviction based on a guilty plea is not absolute; the court is not bound to accept the accused's admission of truth of the charge and convict him as there may in the words of the statute: ‘*appear sufficient cause to the contrary*’: and that where, for instance, it appears that at the time of taking the plea there existed unusual circumstances such as injury to the accused or the accused is confused or there had been inordinate delay in bringing the accused to court from the date of the arrest, then an explanation of the circumstances must form an integral part of the facts to be stated by the prosecution to the court.”

In **Macharia vs Republic (2003) KLR** the Court of Appeal held:

“A court does not alter a sentence on the mere ground that if a member of the court had been trying the appellant they might have passed a somewhat different sentence; and that an appellate court will not ordinarily interfere with the discretion exercised by a trial judge unless it is evident that the judge acted upon some wrong principle or overlooked some material factors.”

11. To clear any doubt on how the appellants took their plea and whether the appellants understood the language used in court, I will proceed and consider the submission by their Counsel that the appellants did not understand the language used and were not provided with an interpreter.

(i) LANGUAGE

12. The record before me shows that the charge was read over and explained to the Appellants in English language and interpreted in Kiswahili language. It also shows that the Appellants fully participated in the process.

13. The trial Magistrate recorded the plea as follows:

" The substance of the charge(s) and every element thereof has been stated by the Court to the accused person, in the language that he/she understands Kiswahili who being asked whether he/she admits or denies the truth of the charge(s) replies:

1st Accused: Ni kweli

2nd accused: Ni kweli

Court: Plea of guilty entered."

14. In my view, the appellants understood the language and the recording of the plea was proper and in accordance with the holding in **Kariuki vs Republic (1984) KLR 809** where the Court of Appeal held:

"The manner in which a plea of guilty should be recorded is:

- a. **The trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands;**
- b. **He should then record the accused's own words and if they are an admission, a plea of guilty should be recorded;**
- c. **The prosecution may 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;**
- d. **If the accused does not agree to the facts or raise any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused's reply should be recorded."**

15. Even though under **Article 50 (1) (m) of the Constitution of Kenya** an accused person has a right to have the assistance of an interpreter if he cannot understand the language of the case, in the instant case, there is no evidence that the Appellants did not understand the language of the court. As observed earlier, they fully and satisfactorily participated in the trial process.

16. In view of the foregoing, the allegation that the appellants were completely illiterate and did not understand the Kiswahili language is untrue and is unsustainable.

(ii) Sentence

17. In exercise of discretion, the learned trial magistrate sentenced the appellants to three (3) years each in jail. Upon evaluating the evidence, I find that in so doing the trial magistrate considered that the appellants were first offenders with dependants whose faith would not allow them take their children to hospital. He also considered the rights of the children and the desirability of passing a sentence that would act as a deterrent to the appellants and other members of similar sects. He observed:

"I have considered that the accused are first offenders with dependants. But they insist that their faith does not allow them to take their children to hospital. Under Article 35 of the

constitution, Every child has the right to health care. The duty to provide health care is given to the parents of the child by section 23 of the children Act. It is sad that while the government has been providing basic health care and immunization which is money free in public hospital for children, the accused do not take the children to hospital because of their faith. It is necessary to affirm the right of the child to health care and send a strong message to member of sects that do not believe in primary health care for children. Such sects are many in this region. A deterrent sentence is therefore necessary. Each accused is sentenced to serve three years imprisonment."

18. As noted above, the trial magistrate considered the peculiar circumstances of the case before it and imposed a sentence which it considered appropriate in the circumstances. Even though the Appellants pleaded for mercy, in the face of the court, in their mitigation it was clear that they were not ready to change their weird lifestyle and that it was not in the best interest of the children that they be unleashed to them before they had learnt their lesson.

19. The maximum sentence for the offence that the Appellants were charged with is five years imprisonment or a fine not exceeding two hundred thousand shillings, or both. The trial magistrate imposed three years imprisonment. That sentence is lawful and in passing it he neither acted on a wrong principle nor overlooked some material facts. The appellants have been out on bail and have not served the sentence in prison; they have not had an opportunity to learn anything, as anticipated by the trial court. Consequently, I confirm the sentence imposed by the lower court.

20. The upshot of the foregoing is that the Appellants shall serve the three years imprisonment term meted on them and their bail terms are cancelled forthwith.

Dated, Signed and Delivered at Nakuru this 22nd day of November, 2013

L. N. WAITHAKA

JUDGE

PRESENT

Ms Njeri for the Appellants

Mr. Marete for the State

Appellants - present