REPUBLIC OF KENYA

High Court at Nakuru

Criminal Appeal 18 & 17 of 2012

EVANS MUNGAI NGANGA.....1ST APPELLANT
LYDIA WAMBUI.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence imposed by Hon. E. Boke PM Naivasha Law courts on their plea of guilty on 30th January, 2011)

JUDGMENT

The appellants herein, Evans Mungai Nganga and Lydia Wambui, were charged with offence of neglecting a child contrary to **Section 127(b)** of the **Children Act, 2001** to which they pleaded guilty and upon conviction the court sentenced them to serve two years in jail.

Aggrieved by the conviction and sentence, the appellants have preferred two seperate appeal (which were cponsolidated) to this court on grounds which can be summarised as follows:

1. That the learned trial magistrate failed to find that their plea was equivocal;22

2. That the learned trial magistrate failed to consider their mitigation;

3. That the learned trial magistrate imposed a harsh and excessive sentence; and

4. That the sentence was not in the best interest of the children.

Counsel for the appellants submitted that the plea by the appellants was not unequivocal; that the court did not specify which language that was used and whether the appellants understood it; that the court did not consider their mitigation; and that the sentence imposed was not only excessive but also not in the best interest of the children. He further submitted that the appellants having spent six (6) months in prison have learnt their lesson.

Learned counsel for the respondent contended that the appellants were properly convicted; that the plea of guilty was properly entered; and that the recording of language was based on standard form translation, namely, from English to Kiswahili. He submitted that the sentence was proper as it was informed by the reports of the Children's Officer and the Probation Officer both of whom found the appellants unworthy of their Children and unsuitable for a non-custodial sentence.

I have considered the submissions by the counsel for the appellants and those by the Counsel for the

respondent.

Regarding the plea, the record before me shows that the charge was read over and explained to the appellants in English language and interpretted in Kiswahili language. It also shows that the appellants fully participated in the process. For instance after they were convicted on their own plea of guilty, in mitigation, they both pleaded for mercy. They also prayed for bail pending filing of a pre-sentence report.

The trial magistrate recorded the plea as follows:

"Charge read over and explained to the accused person in English/Kiswahili language which he understands and states:

Accused 1 True
Accused 2 True
.....

Mention on 20/1/12 the prosecution to conduct the Children Office for facts.

.....

20/2/12 (In cleared Court)

.....

Accused both present

Inter English/Kiswahili

PROSECUTION FACTS

On 16/1/12 at Gilgil Township a grandmother to one David Karimi a boy aged 8 years and Rihana a girl aged 1 year, carried them to Gilgil Police Station and reported that the parents who are the accused persons at the dock have neglected the children by abandoning them at her place and failing to provide them with basic needs. The OCS tried to reconcile accused persons and the grandmother of the children but it was in vain because accused persons were not willing to provide for their children. They were arrested and charged. The children are still with their grandmother. That is all.

Accused 1 All facts correct

Accused 2 All facts correct

Convicted on own plea of guilt."

In my view, the said recording of the plea was proper and in accordance with the holding in **Kariuki** V. **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 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."

Even though under Article 50(1)(m) of the Constitution of Kenya an accused person has a right to have the assistance of an interpretter 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.

In view of the foregoing the allegation that the plea was equivocal is unsustainable.

In exercise of her discretion, the learned trial magistrate sentenced the appellants to two (2) years in jail. In so doing the trial magistrate considered the pre-sentence report which was not in favour of a non-custodial sentence and the desirability of passing a sentence that would help reform the appellants. She observed:

"....Their reports are not suitable for non-custodial sentence, since they are not remorseful and they also need to be rehabilitated because of their drinking habit and since it cannot be done when they are out due to their arrogance and not ready to change attitude, I feel that rehabilitation can be done in prison where they can be made to forget drinking. They deserve a short deterrent sentence in order to teach them a lesson. They are sentenced to serve 2 years imprisonment each."

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.

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** V. **Republic** (1991) KLR 567 in which the Court of Appeal observed:-

"There is along 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** V. **Republic** (2003) KLR 115 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."

As noted above, the trial magistrate considered the peculiar circumstances of the case before it and in accordance with the reports filed before it, imposed a sentence which it considered appropriate in the circumstances.

Even though the appellants pleaded for mercy, in the face of the court, the reports filed thereafter showed 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 are reformed. This is what the probation officer

found about the appellants:-

“The mother to the accused pleads for a custodial sentence since the accused's presence or not is not beneficial to the children. In fact the accused's presence has a negative impact on the psychological upbringing of the child. The 1st born child confessed before the accused's parent's, co-accused's mother and I that the two(accused and co-accused) have time and again disowned her.”

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 two years imprisonment. That sentence is lawful and in passing it she neither acted on a wrong principle nor overlooked some material facts. However, given the fact the appellants have already served half of the sentence in prison; they have got an opportunity to reform themselves, as anticipated by the trial court. Consequently, I vary the sentence by suspending the unserved term thereof.

The upshot of the foregoing is that the appellants shall be set at liberty forthwith but liable for arrest and imprisonment in respect of the remaining/unsereved term of the sentence if they neglect or abuse their children again.

Dated, Signed and Delivered at Nakuru this 31st day of October, 2012.

W. OUKO
JUDGE