



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 353 OF 2008

(From Original Conviction and Sentence in Criminal Case No. 972 of 2008 of the Senior Resident Magistrate's Court at Voi: P.N. NDWIGA – S.R.M.)

GRACE NJERI APPELLANT

-VERSUS-

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant **GRACE NJERI** has filed this appeal challenging her conviction and sentence on a charge of **INFANTICIDE CONTRARY TO SECTION 210 OF THE PENAL CODE**. The particulars of the charge were that:

“On the 21st day of October 2008 at [sic] near homesboys garage in Taita Taveta District within the Coast Province, willfully and unlawfully caused the death of SIMON KIIRIA by throwing the said SIMON KIIRIA in a pit latrine.”

The Appellant was arraigned before the Senior Resident Magistrate sitting at Voi Law Courts on 27th October 2008. The charges were read out and the Appellant entered a plea of **‘not guilty’**. The hearing was set for 9th December 2008. On that day the charges were once more read out to the Appellant who on this occasion changed her plea to **‘guilty’**. The matter was put off to 10th November 2008 for facts to be read. On that day the charges were read out to the Appellant for a third time and she maintained her plea of guilty. The court prosecutor then read out the facts of the case as required by law. The accused responded by saying:

“The facts are true and correct”

The trial magistrate then proceeded to convict the Appellant in accordance with S. 207(2) of the Criminal Procedure Code. The Appellant was then allowed an opportunity to mitigate after which the court sentenced her to serve twenty (20) years imprisonment. It is against this that the Appellant now appeals.

I have carefully perused the submissions made by the Appellant and note that she is appealing merely against her sentence alone. She raises no issues concerning her conviction – suffice to say I do find that the law and procedure were properly followed by the trial court in convicting the Appellant. Her plea of guilty was unequivocal and by her participation in the proceeding it is clear that language was no

barrier. I do therefore confirm the conviction of the Appellant for the offence of infanticide.

Basically in appealing against her sentence the Appellant is asking for forgiveness and expresses regret for the act she did. The Appellant did plead guilty to the offence saving the court from an unnecessary trial. Further the court prosecutor did indicate that the Appellant was a first offender. The trial magistrate ought to have considered the special nature of this offence called '*infanticide*'. S. 210 of the Penal Code provides:

“where a woman by any willful act or omission causes the death of her child being a child under the age of twelve months, but at the time of her 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, 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”

By the very definition of the offence, S. 210 does envisage that a woman committing this offence of infanticide has her reasoning impaired due to the effects of child birth or lactation. In other words the offence does take into account the condition commonly referred to as '*post-partum depression*'. In those circumstances the accused ought not be dealt with in similar manner to one who conceives the malice aforethought and proceeds to commit the act of murder. In my view the 20 year sentence given the circumstances was harsh and excessive. No doubt the trial magistrate was outraged by the loss of a young life but in my view she ought to have called for a Probation Report in order to assess the background of the Appellant. Having been sentenced in December 2008 the Appellant has already served two (2) years behind bars. I therefore set aside this twenty (20) year term and substitute the lesser sentence of five (5) years imprisonment to run from the date of first sentence in the lower court.

It is so ordered.

Dated and Delivered at Mombasa this 21st day of March 2011.

**M. ODERO
JUDGE**

In the presence of:
Mr. Onserio for State
Appellant in person