REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 277 of 2007

CATHERINE WAMBUI GICHANGA ..... APPELANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence in Senior Resident Magistrate's Court at Karatina in Criminal Case No. 1051 of 2005 dated 7th November 2006 by P. C. Tororey – Ag. P.M.)

J U D G M E N T

The appellant was arraigned before the Senior Resident Magistrate's Court at Karatina on a charge of concealing Birth contrary to Section 227 of the Penal Code. Facts as disclosed by the charge sheet are that on the 5th November 2005 at Sofia Estate in Nyeri District within Central Province having given birth to a premature baby girl concealed such birth by throwing the baby into a pit latrine. The Appellant pleaded not guilty to the charge.

At the trial, the prosecution called a total of three witnesses. In her defence the appellant opted for sworn statutory statement. After the court had given due consideration to the evidence adduced by the prosecution and the defence advanced by the appellant with regard to the charges the learned trial magistrate found for the prosecution. Upon conviction the appellant was sentenced to five years imprisonment. The appellant was dissatisfied by the conviction and sentence. Consequently she lodged the instant appeal against both the conviction and sentence.

When the appeal came up for hearing, the appellant at the very commencement of the hearing notified the court through **Mr. Muhoho**, learned counsel she had retained to appear for her in this appeal that she was abandoning the appeal on conviction. However she was prepared to proceed with the appeal on sentence only. The state through **Mr. Orinda** leaned Senior Principal State Counsel did not object to the turn of events.

In his submissions regarding sentence, **Mr. Muhoho** stated that the sentence imposed was illegal, harsh and excessive considering that the appellant was a first offender. The counsel submitted that the offence charged was a misdemeanour carrying a maximum sentence of two years imprisonment. However in the circumstances of this case the appellant was sentenced to five years which clearly was an illegal sentence. The appellant had so far served two years of the sentence imposed being the maximum sentence for the offence.

On the part of state, **Mr. Orinda** conceded that the sentence imposed was indeed illegal, harsh and manifestly excessive. That the legal sentence had been served and the appellant ought to be released from prison forthwith.

It is trite law that the first appellate court should not interfere with sentence imposed by the trial court solely on the ground that it is heavy unless it is also shown to be illegal or manifestly harsh and excessive. See **Griffin v/s Republic (1981) KLR 121** and **Wanjema v/s Republic (1971) E.A. 494**. The appellant was a first offender. It would appear that the court did not even take into account her mitigation and the circumstances under which the offence was committed. Had the trial magistrate

considered the foregoing I am certain that she would have imposed slightly different sentence. The sentence of five years imprisonment would in the circumstances of this case appear to be manifestly harsh and excessive.

As I have already stated, it would appear that the sentence imposed as aforesaid was illegal. The offence charged was a misdemeanour. It attracts a maximum sentence of two years yet the appellant was sentenced to five years imprisonment. The sentence is therefore patently illegal. I note that the appellant was sentenced on 7th November 2006 and by the time the appeal came up for hearing she had so already served two years being the legal sentence permissible. That being the case I would interfere with sentence and correct the mistake committed by the learned magistrate in imposing that illegal sentence pursuant to the powers conferred on me by section 354(3), (iii) of the Criminal Procedure Code. I would reduce the sentence from five years imprisonment to a term of two years imprisonment effective from the date of conviction in the subordinate court. The consequence of this order therefore is that the appellant should forthwith be set at liberty unless otherwise lawfully held.

Dated and delivered at Nyeri this 29th day of January 2009

M. S. A. MAKHANDIA

JUDGE