



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 43 of 2007

ELNORA KULOLA ILONGO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Elnorah Kulola Ilongo, the appellant was tried on a charge of procuring abortion contrary to Section 159 of the Penal Code. The particulars were that on 23rd April 2006, at Ronge Juu Location in Taita Taveta District within Coast Province, being with a child and with intent to procure her own miscarriage, unlawfully administered to herself a poison called Aspirin and fansidar.

It was the prosecution case that the appellant was five months pregnant with child on 23rd April 2006. PW 2, Jotham Mbela Makare, the Assistant Chief of the area, became aware, from information he received from his colleague, that the appellant intended to terminate her pregnancy. He accordingly alerted his chief, PW 1, who summoned the appellant. Before PW 1, the appellant denied ever being pregnant but claimed to be sick. PW 1, Haron Mwachala, on his part testified that he received a report of a five months foetus having been aborted by the appellant. When the appellant was interrogated she denied the abortion.

Later, information was received that a child had been found in a toilet at Murugua shopping centre and police were asked to investigate. On 28th April 2006, the appellant led police to the latrine where the foetus was recovered. PW 3, Lucy Wachira Ngatia, testified that before the recovery of the foetus, the appellant had informed her that she was sick and had asked for lemon which PW 3 delivered. PW 4, Sgt. Joshua Kwale, was asked to investigate the abortion report. He, together with the chief and Assistant Chief, visited the appellant's house and, on being interviewed, she admitted having aborted and led the team to the latrine where the foetus was recovered.

In her unsworn statement, the appellant, though admitting having aborted, denied that it was premeditated. She stated that she had a fever for which she took fansidars and milk and later had pains and the foetus came out which she threw in the toilet.

The Learned Resident Magistrate in a reserved judgment held as follows:-

“In my mind I find that the action of the accused was premeditated and her intention was to get rid of the pregnancy – I say so because immediately after she dumped the foetus, it was business as

usual and there was no talk of malaria any more, secondly, the accused was able to dispose of the foetus so fast that no one saw her doing it. She was clearly hiding and doing all these discreetly. It is wrong for accused to say that the hospital was not functioning.....”

The Learned Resident Magistrate then found the appellant guilty as charged and sentenced her to two (2) years imprisonment. She was not satisfied and has appealed to this court against both conviction and sentence. The grounds filed raise only one issue which is that the prosecution did not prove the charge against the appellant.

Mr. Onserio, Learned State Counsel for the Republic opposed the appeal and submitted that the appellant's actions before and after the abortion suggested that the appellant deliberately took the malaria treatment to effect the abortion. With regard to sentence, Learned counsel submitted that the same was lawful and should not be disturbed.

As is clear from what I have outlined above, the facts before the Learned Resident Magistrate are not really in dispute. The appellant admitted having been pregnant and the pregnancy having been terminated. Her defence was that during the pregnancy, she developed a fever and bought three fansidars which she took with milk. Unfortunately the foetus growing in her came out. She stated that she did not know that fansidar could affect her pregnancy. What the appellant was putting forward as her defence was that she did not deliberately cause the abortion. The Learned Resident Magistrate was of the view that the abortion was pre-meditated. His reasons for that view were that immediately after the abortion the appellant dumped the foetus and resumed her business as usual and that she disposed of the foetus fast and discreetly without being seen.

With respect, those reasons upon which the Learned Resident Magistrate based in his finding of criminal intention are not borne from the record. There was no evidence that after disposing of the foetus the appellant continued as if nothing had happened. There was also no evidence that the actions of the appellant were discreet. I am not persuaded that the Learned Resident Magistrate fully appreciated that it was the duty of the prosecution throughout to prove its case against the appellant. The Learned Resident Magistrate should not have been put in a situation as seems to have happened for him to speculate.

Having independently re-evaluated and reconsidered the evidence which was put forward by the prosecution, I have come to the conclusion that the prosecution did not present evidence before the Learned Resident Magistrate which excluded or rebutted the scenario narrated by the appellant. The appellant could have been saying the truth that she did not know that fansidar, which is a common anti-malaria drug, could cause her miscarriage. No medical evidence was adduced. The appellant in my judgment ought to have been given benefit of doubt. Had the Learned Resident Magistrate done so, he would not have convicted the appellant. That being my view of this matter, I allow this appeal, quash the conviction of the appellant and set aside the sentence of two (2) years imposed on her. The appellant shall be entitled to her liberty forthwith unless she is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF APRIL 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

The Appellant and Mr. Onserio for the Republic.

F. AZANGALALA

JUDGE

28TH APRIL 2009