REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 277 of 2006

M H……..……....……..APPELLANT

VERSUS

REPUBLIC…….……..RESPONDENT

JUDGMENT

The appellant herein M H was on 23rd November, 2006 convicted on her own plea of guilty to a charge of **neglecting a child** contrary to **Section 127(2) of the Children's Act (No.8 of 2001).** She was sentenced to a prison term of 20 months which she now appeals against on the basis that the sentence was harsh and excessive. The particulars of the charge facing the appellant were that, during the month of November, 2006 at [particulars withheld] in Nakuru District of the Rift Valley Province, she wilfully neglected M A, aged 12 years, O H, R H aged 6 years and J H aged 1½ years by failing to take them to hospital when they were sick.

The facts are recorded to have been stated to the appellant before sentencing and were that in November, 2008 police officers received a report to the effect that appellant had not been taking her children to hospital when they fell sick. That upon receipt of the report, police officers went to the appellant's house and found the children named in the charge sheet lying in the house seriously sick and in a coma. That they were taken to the hospital and one of them admitted at the Provincial General Hospital. That the appellant said that her faith did not allow her to take her children to hospital. The record shows that the appellant admitted the said facts to be correct.

The appellant also challenges her conviction on the grounds that it was improper, being based on a plea that was not unequivocal in that the appellant did not understand what she was pleading to since, according to the appellant, she did not understand the Kiswahili language said to have been used as the language of interpretation, she being only conversant with dholuo language.

The entire proceedings are also challenged on the grounds that the learned trial magistrate did not enter a plea after the appellant responded to the charge and the ingredients thereof as stated by the court, but only recording the appellant as having said "***it is true.***" Further that the facts as read out did not disclose any offence particularly since no medical evidence was tendered to support the allegation that the children were sick when found by the police. Submitting on the above, Mr. Karanja Mbugua for the appellant stated that the learned trial magistrate appears to have accepted "***as proof of the case***" the prosecution's allegation that the appellant excused her failure to take the children to hospital on her faith and proceeding to convict the appellant on that basis, other than on the basis of an established offence. That in doing so, the learned trial magistrate wrongfully allowed the prosecution to tender evidence from the bar, that evidence being in the nature of a confession which in any case is outlawed under Kenyan

Law.

The appeal is opposed with the State submitting that the appellant did understand the language used at the taking of the plea as is recorded by the trial magistrate. Submitting for the State, the learned State Counsel **Mr. Mugambi** submitted that the failure to record that a plea of guilty was entered immediately after the appellant's response of "***It is true"*** is not a material omission since the learned trial magistrate did record that the appellant was convicted on her own plea of guilty. Mr. Mugambi submitted further that all the prosecution did was to explain in details what transpired when the appellant's children were found in a neglected state. That wilful neglect was admitted and it is the accused herself who tried to excuse it on the basis of faith.

I have studied the proceedings of 23rd November, 2006 in light of the law and the submissions made herein by counsel on both sides. Regarding the issue of language, I note that the appellant herein made a statement in mitigation which is recorded as follows:

"***ACCUSED (MITIGATION):***

I pray for leniency. I am sorry."

I do not think the appellant would have mitigated her case if she did not understand the Kiswahili language which is clearly recorded as being a language she understood. I refuse to accept the appellant's contention that she did not understand the proceedings or the charge, the ingredients thereof or the facts of the case as stated by the prosecution.

The procedure for taking and recording of pleas is well established under Kenyan Law. As stated in the celebrated case of **Adan** vs. **Republic [1973] E.A. 445** and restated in several other decisions thereafter, including **Kariuki** vs. **Republic** 1984 KLR 809, the court taking a plea must record the accused person's response to the charge in the words used by the accused and if they be an admission, a plea of guilty should be recorded. It is correct, looking at the record, to say that the learned trial magistrate did not record a plea of guilty as having been entered immediately after the appellant's reply to the charge and prior to the taking down of the facts of the case. However, I do not consider that to have amounted to a miscarriage of justice since the record does show that the appellant did admit the facts to be true and was accorded an opportunity to mitigate her case which she did. She cannot therefore be said to have been subjected to an unfair trial.

Regarding the issue whether or not the facts supported the charge, I find it necessary to cite herein the provisions of **Section 127(1)(b)** under which the appellant was charged. The same states as follows:

"***Any person who having parental responsibility, charge or care of any child and who***

(a)……..

(b) by any act or omission, knowingly or wilfully causes that child to become, or contributes to his becoming, in need of care and protection, commits an offence and is liable on conviction to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding five years or to both."

Sub-section 2 of Section 127 provides that a person having parental responsibility custody charge or care of a child shall *(for the purposes of Section 127)* be deemed to have neglected such child in a manner likely to cause injury to his health if the person concerned has failed "***to provide adequate food, clothing, education, immunization, shelter and medical care."***

In light of the above I am of the view that the admission of failure by the appellant to take the children to hospital is enough ground for a conviction under Section 127(1) (b) without a medical certificate being tendered in evidence before the trial court. I am of the considered view therefore that the facts as stated by the prosecution did support the charge and that the conviction as properly arrived at.

As regards the sentence of 20 months which the appellant challenges as being harsh and excessive, I find that the same, weighed against the prescribed punishment as set out above the same is quite lenient, considering the facts of the case. The only issue I have with the same is whether, given the circumstances, the custodial sentence is appropriate.

At the time sentence was passed the court was told that the appellant's children, including a baby of 1½ years were being taken care of by a good Samaritan. Despite the learned trial magistrate directing that there be a mention on 1st December, 2006 "***to find out the whereabouts of the children,"*** the learned trial magistrate did not enquire into the welfare of the children but proceeded to "***close the case"*** on 7th December, 2006 when he recorded only that:

> "***I have already dealt with the matter.***
>
> ***File closed."***

I am of the view that a custodial sentence, is in the circumstances, contrary to the spirit and purpose of the Children's Act which is, primarily, to safeguard the rights and welfare of the child. Under Section 4(1) of the Act, the responsibility to ensure the survival and development of a child is a shared responsibility between the Government of Kenya and the family. So is the responsibility to provide medical care as set out in Section 9 of the Act. Under Section 6(1) of the Act, every child has a right to live with and be cared for by his parents, unless in cases where a court of law or the Director of Children's Services determines in accordance with the law that it is in the best interests of the child to separate him from his parent, wherein the best alternative care available shall be provided for the child.

I am of the considered opinion that in failing to consider the above provisions and passing a custodial sentence, without first of all making a finding as to whether the separation of the affected children from the mother was in their best interest, the learned trial magistrate erred both in law and in fact.

The learned trial magistrate ought to have obtained a Probation Officer's Report to ascertain the status of the affected children and the suitability of the appellant as the care giver before sentencing her to a 20 months prison term. The prosecution having stated that the children were in the care of a good Samaritan, I am inclined to find that the sentence was not appropriate. However, before I can make a final finding in this appeal, I hereby exercise my powers under **Section 358(l) of the Criminal Procedure Code** and order that the Provincial Probation Officer obtains and files a Probation Report on the status of children herein and their family atmosphere in order that the ends of justice are met for the benefit of all concerned and the rights and welfare of the affected children are upheld and safeguarded in accordance with the Children's Act, thereby giving effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child as required by law.

There shall be a mention of the case on 12th June, 2009 when the appellant, who has been on bail pending appeal, must attend, failing which her bail will be cancelled. The appellant's bond is hereby extended to the mention date.

Dated, signed and delivered at Nakuru this 21st day of May, 2009.

M. G. MUGO

JUDGE