REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL 7 OF 2007

MIRIAM KINANU KIMEI…….APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

JUDGMENT

The appeal herein is in the nature of mitigation. It challenges the appellant's sentence of eight years imprisonment for the offences of

i) Grievous harm contrary to section 234 of the Penal Code (Count 1) (5years).

ii) Neglecting a child contrary to section 127(1)(b) of the Children's Act (Count 2) (1 year).

iii) Neglecting a child contrary to section 127(1)(b) of the Children's Act (Count 3) (1 year).

iv) Causing a child to be in need of care and protection contrary to section 127 (1)(b) of the Children's Act (Count 4) (1 year).

The sentences were passed consequent upon the appellant's plea of guilt.

In her petition of appeal filed on 19th January 2007 the appellant cited one main ground, to wit, that the sentences on all counts were harsh and excessive, given that she was a first offender. She prays for leniency and asks the court to substitute the prison term with a non-custodial sentence, stating that she is willing to subject herself to community service.

The State, represented by the learned State Counsel **Mr. Mugambi** has conceded the appeal on the basis that the language of the court, at the time the plea was taken, having not been indicated in the proceedings and there being no indication whether the same was interpreted to the appellant in a language that she understood, then the plea cannot be said, with certainty, to have been unequivocal.

The appellant was initially charged with the offence of causing grievous harm to a minor. At the time of taking the plea on 3rd January 2007, the court recorded the language of the court as English/Swahili without stating whether either language was understood by the appellant. She pleaded guilty to the charge. Before facts could be stated by the prosecution, the latter applied for an adjournment. When the matter came up for mention on 11th January 2007, the prosecution applied to substitute the charge adding fresh counts under the children's Act as stated in (ii) to (iv) above.

The appellant is shown to have pleaded guilty to all the charges despite the language not being shown. No facts were stated to the appellant by the prosecutor, who only told the court that the same were

"***as per the charge sheet."***

The appellant was then convicted. In mitigation she pleaded for leniency, saying that she had a young child who needed her care, had learnt her lesson and was remorseful. Her plea does not appear to have impressed the learned trial magistrate, who nonetheless proceeded to sentence the appellant to the maximum punishment prescribed under **section 127(1)** of the **Children's Act,** albeit, on the charge of causing grievous harm brought under the Penal Code in place of the similar offence under the Children's Act.

It being quite clear that the language of the court was not specified when the plea was taken, coupled with the fact that no interpretation is shown to have been accorded the appellant, I am led to agree with the State that the appellant's right to a fair trial was infringed to the extent that the conviction cannot be considered as safe. I find that the provisions of **Section 198** of the **Penal Code** and **Section 77** of the **Constitution** were breached in the circumstances.

Although not raised by the State, I find that the failure to state the facts of the case before the conviction was fatal to the proceedings, such omission being contrary to the laid down procedure for the taking of plea and sentencing. See **Adan –vs- Rep [1973] E.A. 445** and **Ombema –vs- Rep [1981] KLR 450.** I must state here, also, that in my considered view, the charge under **section 127(1)(b)** of the **Children's Act** *(counts 2, 3 and 4)* is bad for multiplicity.

In view of the seriousness of the offence herein and considering that the facts of the case were not stated for this court to consider an appropriate sentence, I order and direct that the Provincial Probation Officer do file a report on the suitability of the appellant being placed on a non-custodial sentence.

Otherwise, the present appeal succeeds, the conviction is hereby quashed and the sentences set aside.

The appellant will remain in custody pending the filing of the report ordered herein on or before the 24th day of July 2009 when the matter shall be mentioned for sentencing. The report to be filed must disclose to the court the whereabouts and current status of the minor, MERCY NKATHA, the victim herein.

Dated, signed and delivered at Nakuru this 26th day of June 2009

M. G. MUGO

JUDGE

In the presence of:

Mr. Mugambi - For State

Appellant - In person