**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**OF KISII**
**Criminal Appeal 137 of 2007**

**(From original conviction and sentence in the Ogembo Senior Resident**

**Magistrate's Court Criminal Case No.945 of 2007 – J. K. NYARGAR AG.S.R.M)**

**GLADYS KEMUNTO ONDUSO …….. APPELLANT**

**VERSUS**

**REPUBLIC ……..…… RESPONDENT**

**JUDGMENT**

The Appellant pleaded guilty to the offence of attempted infanticide contrary to **section 210** of the **Penal Code** as read with **section 388(1)** of the same. She was convicted and sentenced to serve 7 years imprisonment. She has appealed against the conviction and sentence.

The particulars of the charge were that on the 27th August, 2007 at Nyamache sub location, Gucha District in Nyanza Province, she gave birth to a baby boy whom she wrapped in a piece of cloth and lesso and threw in a pit latrine. The facts that were narrated to her by the prosecutor were that on 27th August, 2007 she gave birth to a baby boy whom she threw into a pit latrine and disappeared from home. On the same day, a person went to the latrine for the call of nature and heard the child crying. He raised alarm and neighbours came and removed the infant from the toilet. It was still alive. It was washed and taken to Nyamache Hospital. The Appellant was later traced and arrested. She admitted those facts and was convicted on her own plea. In mitigation, she asked for leniency and stated that she was going to take care the child. The court noted her plea in mitigation before sentencing her. The prosecution had stated that they had no record of Appellant's past antecedents.

In the Petition of Appeal the Appellant stated that she had been hurriedly convicted before the charge was read and explained to her. She stated that she had not understood the charge. While prosecuting this appeal she spoke in Kisii language. The record of the trial court shows that there was translation in "ekegusii" language. The record shows there was scrupulous attempt by the court to make sure the Appellant understood the charge and what she was pleading to. Her mitigation also goes to show that she understood what was happening. I am satisfied that the charge and all its essential ingredients were explained to the Appellant in her vernacular language and that she understood them well before she pleaded. Her reply to the charge was inequivocal **(Adan v Republic [1973] EA 445).**

Regarding sentence, the Appellant complained that it was illegal. Under **section 389** of **Penal Code** the maximum penalty for the offence in respect of which she was charged was 7 years imprisonment. Noting that the prosecution did not have a record of her past deeds, she was entitled to be treated a first offender. The general rule is that a maximum sentence should not be imposed on a first offender **(Otieno v Republic [1983] KLR 295)**. There was no reason why this rule was departed from.

The child in this case is alive and, like it was pleaded by the Appellant in mitigation, it is expected that she is going to take care of it. Incarcerating her further means denying this child at its tender age the care of the mother. Because of these reasons, I find that the sentence imposed by the court was manifestly excessive. It is set aside and an order made reducing it to the period already served. She will consequently be released unless she is otherwise being lawfully detained.

**Dated, signed** and **delivered at KISII** this **24th** day of **June, 2009**

**A. O. MUCHELULE**

**JUDGE**

**24/6/09**

Before A. O. Muchelule J

Mongare cc.

Mr. Mutai for State

Appellant present

**Court:** Judgment in open court.

A. O. MUCHELULE

**JUDGE**