REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 79 of 2009

LAWRENCE KARIMI .... APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

(Appeal from original Conviction and Sentence of the Senior Resident Magistrate's Court at Nanyuki in Criminal Case No. 760 of 2009 dated 9th April 2009 by E. N. Gichangi –RM)

J U D G M E N T

The appellant herein was convicted on his own plea of guilty for the offence of ill treatment of a child contrary to section 127(1) (a) of the children's Act. The particulars of the charge were that:-

"On the diverse dates between 12th February and 19th March, 2009 at Muthaiga area in Laikipia East District within Rift valley province having parental responsibility of Winfred Kananu a child aged 8 years, wilfully ill-treated the said child by caning and biting her, causing several bruises and tooth marks on her body subjecting her to unnecessary suffering." Upon conviction he was sentenced to serve 4 years imprisonment. The appellant was aggrieved by the conviction and sentence, hence this appeal.

In his petition of appeal filed through **Messrs Wagiita Theuri & Co. Advocates**, the appellant impugned his conviction and sentence on the grounds that:-

1. The learned trial magistrate erred in law and fact in failing to appreciate that the charge sheet was at variance or was not supported by the particulars and facts brought fourth by the prosecution hence occasioning a miscarriage of justice.

2. The learned trial magistrate erred in law and fact in failing to appreciate that no medical documents were produced or tendered before court to proof the offence was committed.

3. The learned trial magistrate erred in law and fact in failing to appreciate that the facts by the prosecution did not specifically refer to the appellant.

4. The learned trial magistrate erred in law and fact in failing to consider the mitigation by the appellant, hence sentencing him to a severe term of imprisonment.

5. The learned trial magistrate erred in law and fact in failing to appreciate that the offence attracted an option of a fine.

6. The learned trial magistrate erred in taking into account extraneous matters in sentencing the appellant.

7. The learned trial magistrate erred in law and fact in failing to consider all the facts surrounding the matter which facts required leniency and a light sentence.

When the appeal came up for hearing, **Mr. Wagiita**, learned counsel for the appellant, submitted that the injuries on the

child could not be proved by photographs, facts did not point at the appellant as the culprit, sentence imposed was harsh and excessive, the appellant's mitigation was not taken into account and that the learned magistrate took into account extraneous matters such as prevalence of the offence in the area when considering appropriate sentence to be meted out.

The appeal was opposed. **Mr. Makura**, learned Senior State Counsel submitted that the plea was unequivocal, that no objection was raised with regard to the production of photographs, sentence imposed was lawful and that the trial court exercised its discretion on sentence judicially and properly.

On the question of conviction, it should be noted that the appellant pleaded to the charge. Accordingly that conviction can only be faulted if it is established that the plea was not taken properly or that it was equivocal. In the case of **Adan v/s Republic (1970) E.A. 24**, the East African Court of appeal set out the proper procedure to be followed by courts when recording plea of guilty. The procedure is as follows:-

"(i) That the charge and the particulars of the offence should be explained to the accused in the language that he/she understands.

(ii) That the plea should as far as possible be recorded in the words of the accused.

(iii) That in the event of a plea of guilty the fact should be stated to the accused and he/she should be grated an opportunity to respond.

(iv) That if an accused disputes the facts of the charge a plea of 'Not guilty' must be entered.

(v) Where there is more than one accused jointly charged, the plea of each should be recorded separately. And if a charge or indictment contains several counts the accused must be asked to plead to them separately.

(vi) In the event that an accused does not change his/her plea, a plea of guilty should be entered and a conviction recorded and after mitigation and facts relevant to sentence are taken the sentence can be meted out.

Applying the above steps in the circumstances of this case I do not discern any misstep undertaken by the learned magistrate when she recorded a guilty plea against the appellant. The learned magistrate scrupulously adhered to the above requirements and or guidelines. Accordingly the plea of guilty recorded against the appellant cannot in any way be faulted or impugned. The plea was unequivocal. As correctly submitted by **Mr. Makura**, no objection was raised with regard to the production of the photographs by the prosecution to show the injuries sustained by the complainant following the appellant's assault and ill-treatment of the complainant. Contrary to the submissions of the appellant's counsel, the facts did actually point to the appellant as having caused those injuries. The appellant is a well schooled person. He works for the Military. He had a right to dispute the facts. He did not and cannot claim that the facts did not point at him as the perpetrator of the offence. Indeed even in his own mitigation he implicidly conceded to having punished the complainant to instil some discipline in her.

In view of the foregoing I would dismiss the appeal on conviction.

The sentence imposed has however been a source of considerable anxiety to me. Under the children's Act, the maximum sentence that can be imposed for the offence confronting the appellant is a maximum fine of Kshs.200,000/=, or to imprisonment for a term not exceeding five years, or both. The learned magistrate however opted to impose a custodial sentence without laying a factual basis for the same.

Yes, it has been constantly stated that sentencing is a matter for the discretion of the trial court. The discretion must however, be exercised judicially. The trial court must be guided by evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous and irrelevant factors.

It has always been my view that where a statute imposes options regarding sentences to be imposed such as fine, imprisonment and or both in that order for an offence committed under it, then the sentencing court must of necessity consider the appropriateness of imposing a fine first instead of a custodial sentence. It is only after the sentencing court is of the opinion that a sentence of a fine is undesirable in the circumstances of the case then, only and only then should it consider imposing a custodial sentence. Further the sentencing notes of the magistrate should justify why a custodial sentence was preferred as opposed to a fine. Our prisons are teaming with prisoners who ought not to have been jailed in the first place if the learned magistrates exercised the options of imposing fines. I think the appellant is one such person.

From the mitigation proferred by the appellant, it appears that he is a single parent to the complainant. The mother of the complainant who was previously married to him apparently abandoned the complainant with the appellant. That being the case, the jailing of the appellant obviously rendered the complainant destitute. To my mind the learned magistrate's

decision to imprison the appellant did much harm to the complainant than the appellant. Further from the children's Department Social Enquiry report, it is clear that the appellant was a military officer. Any jail term would obviously lead to him to loose his job. Is such situation in the best interest of the child, the complainant? I do not think so.

I think I have said enough to show that the sentence imposed was manifestly harsh, excessive and wholly unjustified. It calls for my intervention no doubt. I would have been minded to substitute the same with a fine. However, I note that the appellant was gaoled on 9th April 2009. The appellant has thus served 5 months imprisonment. I think that, that is sufficient punishment.

In the result, I would dismiss the appeal on conviction. However on sentence, I set aside the sentence of 4 years imprisonment and substitute therefor with the sentence so far served. The consequence of this holding is that the appellant should forthwith be set at liberty unless otherwise lawfully held.

Dated and delivered at Nyeri this 31st day of July 2009.

M. S. A. MAKHANDIA

JUDGE