IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 536 of 2005

ZEDEKIAH ONDABA LAWI……....……..APPELLANT

VERSUS

REPUBLIC…….…....RESPONDENT

From original conviction (s) and Sentence(s) in Criminal Case No. 131 of 2004

of the Chief Magistrate's Court at Kiambu (L. Muhiu - SRM)

J U D G M E N T

ZEDEKIAH ONDABA LAWI was convicted for **NEGLECTING CHILDREN** contrary to **Section 127(1) (a)** of the **Children Act**. It is alleged that on diverse dates in December 2003 the Appellant neglected his five children in contravention of the **Children Act**.

The Appellant is challenging both the conviction and sentence. The Appellant has raised four grounds, which upon consideration can be reduced to only two grounds: -

One that the Appellant was a first offender and that in the circumstances the sentence of 3 years imprisonment is too harsh;

Two, that the children's mother died in 2000 and that they needed paternal care.

The facts of the prosecution case were that PW1 and PW2, who lived in a plot neighbouring where the Appellant lived heard the Appellant's oldest daughter crying. They went out to find out why and the girl, Rosemary, made serious allegations against the father. Not only was he physically assaulting her but he wanted her to bath him and in the process sexually defile her as he had done severally before. Rosemary was 16 or 17 years old according to PW1 and PW2. On learning this, both witnesses kept the girl overnight before taking up the matter with the Chief the next day, who took no action. They then went to the Children's Department and the Police. That is when the four other children, including PW5, Judy Grace, were taken by the Children Department to Kirigiti Approved School. PW5 testified that the Appellant had beaten them severally without cause, that he had caused them to go without food, forcing them to beg food from neighbours and had also sexually defiled her.

The Appellant appeared in person while **Mrs. Gakobo** represented the State and opposed this appeal. The Appellant's submission was that he did not willfully neglect his children but being a casual labour doing menial work, getting a job was at times difficult. He said that he was unable to get a job in December 2003 and that one day he went home to find his children missing. He urged this court to reduce the sentence.

Mrs. Gakobo submitted that the prosecution had proved that the Appellant had committed acts, which left the children in need of care and protection. Counsel also submitted that PW5, the Appellant's second child, testified that severally the Appellant had thrown them out in the cold to sleep outside, that severally

he had also forced them to beg for good despite being employed.

In reply, the Appellant admitted committing the offence and urged the court for forgiveness.

The Appellant had been charged under **Section 127(1) (a)** of the **Children Act**. The Section provides as follows: -

*"**127 (1) Any person who having parental responsibility, custody, charge or care of any child and who –***

(a) willfully assaults, ill-treats, abandons, or exposes, in any manner likely to cause him unnecessary suffering or injury to health (including injury or loss of sight, hearing, limb or organ of the body, and any mental derangement); or

(b) ……

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.

Provided that the court at any time in the coursed of proceedings for an offence under this subjection, may direct that the person charged shall be charged with and tried for an offence under the Penal Code, if the court is of the opinion that the acts or omissions of the person charged are of a serious or aggravated nature."

The evidence before the court clearly established the offence charged that the Appellant not only neglected his children by abandoning them and exposing them to unnecessary suffering but also willfully assaulted them, and ill-treated them. The evidence adduced by the prosecution also demonstrates that the Appellant also interfered with the investigations into the case against him by removing the child Rosemary, out of the jurisdiction of the Investigating Officers and the Children's Officer. In addition, and more seriously, the evidence adduced against the Appellant demonstrated that he committed more serious offences namely sexually molesting his children. It is quite disappointing to note that the area Chief's Office was apathetic to the children's plight and blocked their ears from hearing their cries. It is also quite unfortunate that finally when the matter was reported to the police, the Police did not handle the case with the commitment and seriousness it deserved. The sexual offences were not adequately investigated. The police raised no finger when the Appellant took away the older girl, who was the cause of these investigations in the first place from their reach.

Given that scenario, the court should have ordered further investigations with a view to charging the Appellant with offences under the Sexual Offences Act or even the Penal Code as the Proviso to **Section 127(1)** of **Children's Act** requires of a trial court. The learned trial magistrate should have exercised its power under the Proviso to **Section 127** of the **Children Act**.

Turning to the appeal itself, I find that the learned trial magistrate's findings at page 4 of the judgment, believing the evidence of PW1, PW2 and PW5 and finding that the Appellant had unlawfully and severally assaulted his children severally in December 2003 cannot be faulted. I agree with the learned trial magistrate's findings that the Appellant and his witness, DW2 did not cast doubt on the evidence of the prosecution witnesses. I do agree with the learned trial magistrate that the prosecution proved its case against the Appellant as required in law. The conviction was safe and correct and accordingly I uphold it.

On the sentence, the maximum sentence provided for this offence is a fine not exceeding two hundred thousand shillings, or to imprisonment for a term not exceeding five years or both. The Appellant was sentenced to three years imprisonment. He was a first offender and the learned trial magistrate considered his mitigation before passing sentence. I do find that the offence was aggravated due to clear evidence of sexual molestation of the children by the Appellant. In the circumstances, the Appellant exposed his children to suffering, ridicule and to danger to their health. It was instructive that the Appellant's daughter, PW5, found life in Approved School far better than with her father. This is quite telling. The

sentence of three years imprisonment is in fact too lenient taking all the circumstances of the case into consideration. I will set aside the sentence of 3 years imprisonment and in substitution thereof order a sentence of 4 years imprisonment from date of sentence.

Right of Appeal explained

Dated at Nairobi this 7th day of February 2007.

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LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant present

Mrs. Gakobo for the State

Tabitha: CC

…….……

LESIIT, J.

JUDGE