



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISUMU

Criminal Appeal 139 of 2006

CHRISTINE ATIENO OCHIENG1st APPELLANT

LILIAN AKINYI alias SALOME..... 2nd APPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case number 537 of 2006 of the Chief Magistrate's Court at Kisumu)

JUDGMENT

The two appellants in this appeal, Christine Atieno Ochieng and Lilian Akinyi alias Salome were charged jointly with the offence of child stealing contrary to Section 174 (1) (a) of the Penal Code. The particulars of the charge were that on 6th July 2006 at Kochieng Sub Location in Kisumu District within Nyanza Province, jointly with intent to deprive Georgina Auma a parent and lawful chargee of Amston Oduor, a child under the age of 14 years of the possession of the said Amston Oduor.

The two appellants were arraigned before the Principal Magistrate, Kisumu on 12th July 2006 and upon the charge and particulars thereof being explained to them they both pleaded guilty. The facts of the case were that the complainant, Georgina Auma had gone to fetch water leaving her three children, aged between 9 ½ years and 1 month, at home. When she returned half an hour later she found the 1 month old baby missing. She immediately informed her husband and father of the missing baby and they both commenced a search. Their search led them to the road leading to Rabuor trading centre where they were informed that two women had been spotted carrying a baby. They soon thereafter encountered the two appellants who, upon seeing them entered a maize plantation only to leave the baby in the plantation and to emerge headed towards the trading centre where they were apprehended. The baby was retrieved from the plantation and resituated to the complainant.

The appellants admitted the said facts as true and were convicted on their own plea of guilty and sentenced to serve 7 years imprisonment each. They have now appealed against the conviction citing in their grounds of appeal, lack of sufficient evidence to support the conviction and saying that their plea of guilt was involuntary. At the hearing of their appeal the appellants chose to have the learned Provincial State Counsel Mr. Mutai submit in answer to their grounds of appeal, to which they both replied, asking the court to reduce the sentence which they challenged as being harsh and excessive.

In his submissions Mr. Mutai said, and rightly so that the appellants were precluded from challenging the conviction but could only raise the issue of the length of the sentence. Mr. Mutai further submitted

that the state had noted that the maximum sentenced provided by law in respect of the offence was meted out. He submitted however that this should only be done where special circumstances are noted and none were noted by the lower court when convicting the appellants and passing the sentences. That their admission of guilt and asking for leniency and forgiveness ought to have been taken into account.

This court has given due consideration to the submission by the Learned State Counsel and by the appellants. It has also studied the brief proceeding before the principal magistrate Mr. Abdul El-Kindy on 12th July 2006. The Lower Court's record shows that the only statements made by the appellants' in mitigation were:-

“Accused 1 – I ask for leniency”

and

“Accused 2 – I ask forgiveness”.

The two appellants did not explain themselves as to what led them to commit the offence of stealing the baby in question or why, upon being spotted with the baby they chose to dash into a maize plantation to hide the baby there rather than surrender it to its parents. They did not express any feeling of remorse when given the opportunity to mitigate the offence before the lower court and have not done so before this court. All they say is that they pleaded guilty and they should therefore have then sentences reduced. I am not persuaded that merely because someone pleads guilty to a charge thus saving the state and the court the expenses and rigours of a full trial does not automatically earn an accused person a lighter sentence than is prescribed under the law.

The court takes judicial notice of the fact that the offence of child stealing has become prevalent in Kenya in the last few years and that it forms a disturbing feature of the emerging crime wave in our country particularly because of its connection with child trafficking and ritual killings. It must be discouraged by the meting out of stiff penalties against those who commit it. However, our criminal justice system is such that justice must be tempered with mercy and that the sentences imposed against those who commit crimes must not only have the effect of deterring others but also ensure that room is created for the convicted person to reform and amend his/her ways and to become a useful member of society. Hence the provision, within our criminal justice system, for mitigation, discretion of the court when meting out sentences and the right of appeal. All these in my view are avenues towards one common end basically to ensure that appropriate sentences are arrived at within reasonable boundaries, taking into account all the facts, circumstances and merits of each individual case.

The actions by the two appellants in this case remain unexplained. They not only caused inexplicable pain and anxiety to the complainant and her family but also risked the life of a 1 month old baby by removing it from the care of its mother and placing it in a maize plantation on the early morning of 12th July 2006. Thank God the baby was recovered intact and restored to its family. Legislature had good reason to provide a maximum sentence of seven years for child thieves. However considering the submissions made by the state and the existing principles of sentencing as pointed out earlier in this judgment, I share the states view that the maximum sentence imposed by the lower court, without setting out any special circumstances to justify the same is rather excessive and the appeal should succeed in that regard. This court is bound to uphold the conviction, the same having been rightly entered upon a plea of guilty but the sentence of 7 years is set aside and instead substituted with one of five (5) years for the reasons given.

Dated and delivered at Kisumu this 18th day of July 2007.

M. G. MUGO

JUDGE

MGM/aao