REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 7 of 2005

(From Original Conviction and Sentence in Criminal Case No.23824 of 2004 of the Chief Magistrate's Court at Makadara – Miss Karani - SRM).

DIANA AWUOR OWINO ……...……..APPELLANT

VERSUS

REPUBLIC…….……..….RESPONDENT
JUDGMENT

DIANA AWUOR OWINO, hereinafter referred to as the Appellant was charged with the offence of child stealing contrary to Section 174 (1) (a) of the Penal Code. When the case came up for plea, the Appellant entered a plea of guilty and was accordingly convicted. Upon conviction she was sentenced to $3_{1/2}$ years imprisonment. She was aggrieved by the sentence and hence lodged this Appeal. In her petition of Appeal, which really is a plea in mitigation, the Appellant says that, she had no intention of stealing the child but her husband forced her into it as for 2 years, she had been unable to conceive a child for her husband. That she was the only person left in her family and has to take care of her orphaned brothers and sisters. That she had learned her mistakes and wishes that this Court pardons her as she was remorseful.

When the Appeal came up for hearing, the Appellant reiterated the foregoing. Mrs. Gakobo Learned State Counsel appeared for the State and opposed the Appeal on sentence. Counsel submitted that although the offence carried a maximum sentence of 7 years, the Appellant had been sentenced to $3_{1/2}$ years imprisonment which was neither harsh nor excessive. The Court in sentencing the Appellant appreciated that the offence was despicable and caused trauma to the Complainant. The offence being prevalent, Counsel urged this Court not to interfere with the sentence imposed and infact dismiss the Appeal.

The facts of the case and which were admitted by the Appellant are that on 15th December, 2004 at Huruma Estate, Ngei two, Nairobi, the Complainant had left her I month old baby in her house with the Appellant who had visited her to go and buy milk so as to prepare tea for the Appellant. On her return she found the baby as well as the appellant missing. She reported the matter to the Police. On 21st December, 2001 acting on a tip-off the Police proceeded to the Appellant's house and found the baby as well as the Appellant. The Appellant was arrested and later charged with the offence.

I have carefully considered the submissions by the Appellant, the Learned State Counsel as well as the facts and the circumstances of the case and the law. The sentence imposed was within the law. It is neither harsh nor excessive contrary to the submissions of the Appellant and considering that the offence attracts a maximum sentence of 7 years and the Appellant was merely sentenced to $3_{1/2}$ years. As stated in the case of ***WANJEMA VS REPUBLIC (1971) EA 493:-***

"…….. An Appellate Court should not interfere with the discretion which a trial Court

exercised as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principles or that sentence is manifestly excessive in the circumstances of the case……"

I do not discern any wrong Application of the principles of sentencing in the instant case. In her sentencing notes it is evident that the Learned Magistrate was alive to the seriousness of the offence and the impact the Appellant's actions had on the Complainant. No doubt the Appellant's action caused the Complainant immense and tremendous anxiety and trauma. The Appellant states that she was pushed into committing the crime due to her craving for a child in order to save her marriage. In my view this cannot be a justification and reason enough for the Appellant's actions and conduct. The sentence imposed in the circumstances was well deserved. It was perhaps even lenient. I see no reason to disturb the sentence imposed. It will stand. Accordingly the Appeal on sentence is dismissed.

Dated at Nairobi this 31st day of July, 2006.

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MAKHANDIA
JUDGE