

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI**

MILIMANI LAW COURTS

Criminal Appeal 1 of 2005

LEONIDA ASIKOAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

LEONIDA ASIKO, the Appellant was convicted on her own plea of guilty for the offence of cruelty to and neglect of children contrary to Section 127 (1) (a) of the Children Act and was sentenced to 5 years imprisonment by Ms. Muchira, Senior Resident Magistrate at Kibera. Being aggrieved by the sentence imposed, the Appellant lodged the instant Appeal.

When the Appeal came up for hearing the Appellant submitted in support thereof that the sentence was harsh and excessive bearing in mind that she was a first offender. She further submitted that she is a single mother of 3 children and also takes care of her sister's 2 children. The sister died in a road traffic accident. She was therefore the sole breadwinner of all the said children. Finally the Appellant submitted that she was remorseful and had learned her lesson.

Mrs. Gakobo, Learned State Counsel appeared for the State. Counsel submitted that the Appellant was sentenced to 5 years imprisonment which is the maximum sentence permitted for the offence. That the Court should have considered the fact that the Appellant was a first offender. In those circumstances the Court should not have imposed a maximum sentence. Finally Counsel pointed out that in the event that the Court was minded to interfere with the sentence a probationary sentence would meet the ends of justice.

In the case of **WANJEMA VS RPUBLIC (1971) EA 493**, the Court stated:-

“..... An Appellate Court should not interfere with 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 principle or the sentence is manifestly excessive in the circumstances of the case...”

In the instant case, the Learned Magistrate had no sentencing notes. It is therefore difficult to tell what was on her mind when she opted to give the Appellant maximum sentence. I need not reiterate the importance of having sentencing notes on record particularly when the sentence imposed is the maximum permitted under the statute.

I note that the Appellant was a first offender and pleaded guilty to the charge at the first instance and thereby saved the Court its valuable time. The Appellant in her mitigation did seek the Court's forgiveness and leniency. She also informed the Court that she had children that she was taking care of. In the absence of the sentencing notes on the part of the Learned Magistrate, I cannot tell whether she considered the Appellant's mitigation. To have imposed a maximum sentence without assigning any reasons for such decision would appear to me to be capricious. The Magistrate obviously did not exercise her discretion in sentencing properly. In the end the sentence imposed was harsh and excessive. As I have had occasion to state in the past maximum sentence should be left to serial Criminals and not first

offenders. The Appellant was sentenced on 23rd December, 2004. She has so far served 1 1/2 years of the term imposed. I think that the Appellant has been sufficiently punished and there is therefore no need to call for a probation report.

In the result, the Appellant's sentence is commuted to the term so far served with the consequence that she should be forthwith set free unless otherwise lawfully held.

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

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MAKHANDIA

JUDGE