REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Criminal Appeal 277 of 2004
(From Original Conviction and Sentence in Criminal Case No. 24751 of 2003 of the Chief Magistrate's Court at Makadara).

BEATRICE WAMBUI KARIUKI…….APPELLANT

VERSUS

REPUBLIC……..……..……RESPONDENT

JUDGMENT

The Appellant, BEATRICE WAMBUI KARIUKI, (hereinafter referred to as the Appellant) was charged with the offence of infanticide contrary to Section 210 of the Penal Code. The particulars of the charge were that on 13th February, 2003 at Muthurwa Estate within Nairobi Area the Appellant caused the death of unknown infant being her own child aged below twelve months.

When the case came up for plea on the 15th April, 2004, the Appellant entered a plea of guilty to the charge. Accordingly she was convicted on her own plea of guilty and sentenced to a term of ten years imprisonment. The Appellant was aggrieved by the sentence. She consequently lodged this Appeal. In her grounds of Appeal, which in my view are really pleas in mitigation, the Appellant states:-

1**. THA**T she was sentenced to serve ten years imprisonment on 25. 5,.2004 for the offence of infanticide under Section 210 of the Penal Code.

2. THAT she pleaded guilty to the charge

3. THAT she delivered the baby normally on 12. 2. 2003 at around 5 p. m. in her house.

4. **THAT** after delivery she took the baby and put her in a bucket of water where later on she died.

5. THAT she did not wish to do so but was forced by circumstances.

6. THAT she has four other children and finds it very hard to manage them.

7. THAT she is single mother and her children depend on her for upkeep and education.

8. THAT she has learned her lesson and promises to be a good citizen upon release.

9. THAT the sentence imposed was too heavy.

10. THAT she begs the Court to review her case and place her on probation.

When the Appeal opened before me, the Appellant in her oral submissions merely repeated the aforesaid grounds of Appeal. Mr. Makura, Learned State Counsel however opposed the Appeal. He submitted that pursuant to Section 210 of the Penal Code, the offence of infanticide is treated as manslaughter of a child. The offence is serious and carries a maximum sentence of life. That the ten years sentence meted out on the Appellant was lawful and within the law. Counsel submitted that the Learned Magistrate exercised his discretion properly. That this Court on Appeal can only interfere with the exercise of the discretion where the same has been exercised improperly or irrelevant considerations have been taken into account by the trial Court. This was not the case here. Counsel further submitted that the Appellant had only served11/2 years which is a small fraction of the sentence imposed. Finally Learned State Counsel submitted that from her demeanor he did not discern any remorsefulness on her part at all.

In the cases of **GRIFFIN VS REPUBLIC (1971) KLR (21) and WANJEMA VS REPUBLIC (1971) EA 493** respectively, it was held that the first Appellate Court should not interfere with the sentence imposed by the trial Court on the ground solely that it is long and heavy unless it is also shown to be manifestly excessive. In the instant case as the Learned State Counsel correctly pointed out the offence with which the Appellant was charged carries a maximum sentence of life imprisonment. The Appellant herein was handed a sentence of ten years and which is within the law.

However, from the record, it does appear that the Appellant was not accorded an opportunity to mitigate. As I have had occasion to comment in the past, mitigation is an important factor in sentencing. Failure to accord an accused person an opportunity to mitigate may lead a Court into imposing a sentence that may well be excessive. I am certain that had the trial Magistrate accorded the Appellant an opportunity to mitigate and bring to fore, what she has stated in the "grounds of Appeal" aforesaid, perhaps he would have imposed a different sentence. I note that the Learned trial Magistrate had toyed with the idea of placing the Appellant on probation. However this was not to be as the probation officer could not recommend rehabilitation on probation in the absence of the Appellant's home report.

Considering the circumstances under which the offence was committed, the fact that the Appellant pleaded guilty to the charge and thereby saved the Court valuable judicial time, the fact that she was a first offender that probation was not recommended due to unavailability of the home report of the Appellant and finally the fact that she was not allowed to mitigate, I am of the view that a sentence of ten years imprisonment imposed was excessive.

Since the Appellant has been in custody from 18th November, 2003, it is my view that he imprisonment term already served by the Appellant is sufficient punishment. I therefore commute the sentence of the Appellant to the term already served. In the result therefore the Appellant is hereby set at liberty unless otherwise lawfully held.

Dated at Nairobi this 21st day of September 2005

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M. S. A. MAKHANDIA

JUDGE