REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
Criminal Appeal 245 of 2004
(From Original conviction and sentence in Criminal Case No. 2811 of 2004 of the Chief Magistrate's court at Kibera)

REGINA MWENDE MUTEMI ……..……..APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

JUDGMENT

The Appellant in this Appeal ***REGINA MWENDE MUTEM***I (to whom I shall refer to as the "Appellant" in this Judgment) was charged and convicted of the offence of child stealing contrary to Section 174 (1) (a) of the Penal Code. The particulars of the offence were that on the 23rd day of march, 2004, at Kibera Lindi, Nairobi District within Nairobi Area, province, with intent to deprive P.C, a parent who had the lawful charge of D.O. a child under the age of fourteen years of the possession of the said D.O.

When the charge was read to the Appellant, she pleaded guilty and a plea of guilty was entered against her. The facts were read to her and she confirmed that the facts as read were true. She was then sentenced to serve three and a half years of imprisonment.

The Appellant was aggrieved with the said sentence and has filed the Appeal before me. The Appeal is premised on the following grounds:-

"1. THAT I pleaded guilty to the charge.

2. THAT the complainant used to leave me with her child for many days as the caretaker.

3. THAT I pleaded guilty to the charge since it was my first time to be in Court and knew nothing about Court proceedings.

4. THAT I am a single mother of one who is 13 years old and depends upon me.

5. THAT the sentence imposed is too heavy and I had no intention of stealing the child.

6. THAT I plead with the Learned Judge to review my case and set me free."

In her address to me, the Appellant who was unrepresented submitted that she just wanted the jail term reduced. That she was remorseful, that she had learned her mistake and that she won't repeat the offence again.

Mrs. Gakobo, Learned State Counsel opposed the Appeal maintaining that the sentence of 31/2 years imprisonment was neither harsh nor excessive in the circumstances of the case.

I have considered the submissions by the Appellant and the Learned State Counsel, as well as the facts and circumstances of this case and the Law.

The particulars of the charge were poorly drafted. Since the charge preferred was under Section 174 (1)(a) of the Penal Code, the particulars of the charge ought to have specifically indicated that the Appellant did any of the following acts in furtherance of the offence. *"….**…forcibly or fraudulently took or enticed away or detained the child……"** T*he particulars of the charge as reproduced above are bare of the aforesaid actions. Did the aforesaid omission render the charge fatally defective and incapable of being pleaded to? I do not think so. The facts given in support of the charge after the Appellant pleaded guilty remedied the situation. It would appear that the Appellant enticed the kid away and took him all the way to Mwingi where he abandoned him and came back to Nairobi. I am of the further view that the aforesaid omission did not occasion any prejudice to the Appellant as from the facts of the case, the Appellant was able to tell the case that was confronting her.

The grounds that she has put down in the petition of Appeal ideally ought to have been urged before the trial Court as mitigation. However, a perusal of the record of the trial Court does not reveal that the Appellant was accorded any opportunity to mitigate. Mitigation is a very important element in sentencing.

An accused person must at all times be accorded an opportunity to mitigate so as to enable the trial Court pass a suitable sentence having considered the accused person's mitigating factors. Failure to do so may occasion prejudice to the accused person and may lead to improper sentencing. The Court may end up passing a sentence that may be inordinately harsh and excessive, or even too lenient in the circumstances.

I am not so certain however that had the trial Magistrate accorded the Appellant an opportunity to mitigate, perhaps a sentence less harsh than the one imposed would have sufficed. I note from the record that the trial Magistrate even contemplated placing the Appellant on probation. However the probation officer's report turned out to be unfavorable to the appellant. I have read through the probation officer's report. The probation officer in refusing to recommend probation service for the Appellant stated:-

> ***"Your honour given the circumstances and specifically the fact that she does not take any responsibility for the offence and is not even remorseful for the agony she caused the child's mother….."***.

This conclusion suggests that the Appellant was not at all remorseful and or repentant for the offence she committed. So that the new found remorsefulness exhibited in Court during the hearing of this Appeal would appear in my view to be an afterthought calculated to hoodwink the Court.

On my own evaluation of the facts and circumstances of the case, I think that 31/2 years imprisonment for an offence which carries a maximum sentence of seven (7) years cannot by any stretch of imagination be viewed as excessive and or harsh considering the stress and agony she caused to the parents of the child by her actions. It was certainly lawful and was in one's mind well deserved. I see no reason to disturb the Lower Court's decision. It will stand. In the result, the Appeal is dismissed.

Dated at Nairobi this 21st of September, 2005.

M. S. A. MAKHANDIA

JUDGE