



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 185 OF 2004

(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE

NO.2942 OF 2004 OF THE PRINCIPLE MAGISTRATE'S AT

NYAHURURU-KATHOKA NGOMO)

ISAAC MWANGI WACHIRA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Isaac Mwangi Wachira was charged with the offence of subjecting a child to torture contrary to **Section 18 (1)** as read with **Section 20 of the Children Act (Act No. 8 of 2002)**. The particulars of the offence were that on diverse dates between the 7th of December 2003 and the 13th of May 2004 at Gwa Kiongo Trading Centre in Nyandarua District the Appellant wilfully subjected one Teresia Wangechi, a female child aged three (3) years to torture by pinching her with fingernails on the face, ears, back and thighs. When the Appellant was arraigned before Court, he pleaded guilty to the charge. He was sentenced to serve three years imprisonment. The Appellant was aggrieved by the said conviction and sentence and has appealed against the said conviction and sentence to this Court.

In his Petition of Appeal, the Appellant has stated that the trial Magistrate erred in handing down an illegal sentence. He further faulted the trial Magistrate for meting out a sentence that was harsh and manifestly excessive in the circumstances. The Appellant further complained that the trial Magistrate did not consider his mitigation before handing down the said sentence. In his Submissions before Court, Mr Nyagaka, Learned Counsel for the Appellant argued that the sentence imposed by the trial Magistrate was illegal. Counsel argued that the maximum sentence provided under the law for the offence which the Appellant was convicted is twelve months imprisonment or a fine not exceeding fifty thousand shillings or both.

Counsel for the Appellant urged this Court to set aside the said sentence and substitute it with a lesser sentence. Mr Nyagaka further submitted that the trial Magistrate did not consider the fact that the Appellant was a single parent, his wife having ran away. The Appellant submitted that during his incarceration his children have suffered. It was the Appellant's argument that the period of imprisonment that he has already served is sufficient punishment for him as he has learnt his lesson. The Appellant urged this Court to further consider sentencing the Appellant to a non-custodial sentence in view of his mitigation.

Mr Gumo, the Assistant Deputy Public Prosecutor supported the conviction of the Appellant. Mr Gumo however conceded that the sentence imposed of three years imprisonment was illegal and the same should be rectified. Mr Gumo submitted that the Appellant should not be sentenced to a non-custodial sentence in view of his conduct towards his children. Mr Gumo submitted that there was real danger that the Appellant would subject the children to further mistreatment if he is released or sentenced to a non-custodial sentence. Mr Gumo submitted that the appropriate sentence to be meted out to the Appellant is a custodial sentence. He therefore prayed that the Appellant's appeal (*other than on the conceded fact*) be dismissed.

I have considered the rival arguments by the Appellant and the state. It is not in dispute that the Appellant was properly convicted on his own plea of guilty on the charge of subjecting a child to torture and cruel treatment contrary to the provisions of **Section 18(1) of the Children Act (Act No. 8 of 2002)**. Both the Counsel for the Appellant and the Assistant Deputy Public Prosecutor agree that the trial Magistrate erred in sentencing the Appellant to serve three years imprisonment. I agree that the said sentence meted out is not provided by the law.

Section 20 of the Children Act provides that:

“Notwithstanding penalties contained in any other law, where any person wilfully or as a consequence of culpable negligence infringes any right of a child as specified in Section 5 to 19 such person shall be liable upon summary conviction to a term of imprisonment not exceeding twelve months or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine.”

In view of the said provision I have no option but to set aside the said sentence of three years imprisonment imposed by the trial Magistrate. I will however substitute the said sentence with an appropriate legal sentence. According to the facts stated to the trial Court by the Prosecution, the Appellant tortured the Complainant, a child three years of age using his finger nails. On examination by the Doctor, it was found that the Complainant had injuries on the head, neck, thorax, abdomen, upper and lower limbs. I have had the opportunity of reading the P3 form which was produced as an exhibit in the trial Court.

The Appellant had no justification in injuring the Complainant, his own daughter. He could not be said to have been disciplining a child of three years. Neither could the Complainant be said to have been at fault to deserve the punishment that was meted out to her by the Appellant. The tragedy of this case is that the Appellant is the parent of the Complainant. The Society expects the Appellant to give protection and love to his children, especially when they are of young and tender age. The actions of the Appellant in undertaking a sustained and prolonged physical abuse of the Complainant, is not an act which can be excused. The Complainant being helpless and defenceless does not deserve to have a father of the ilk of the Appellant.

It is my considered opinion that the circumstances of this case warrants the custody of the said child and the other children of the Appellant to be taken away from the Appellant. The Appellant cannot be trusted not to harm the said child once he has served his term in prison. In the circumstances of this case, the most appropriate sentence to be meted out to the Appellant is a custodial sentence. I hereby sentence the Appellant to serve one year imprisonment. His sentence shall be deemed to commence on the 9th of July 2004 when he was initially sentenced by the trial Court.

It is so ordered.

DATED at NAKURU this day of 2004.

L. KIMARU

AG. JUDGE