REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 28 OF 2013

SKM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal from the Judgment of the Resident Magistrate Honourable G. Adhiambo in Kapsabet Principal Magistrate's court Criminal Case No. 361 of 2013 dated 20th February, 2013)

JUDGMENT

The appellant herein, one *SKM* was charged in the lower court with the offence of infanticide, contrary to *Section 210* as read with *Section 211* of the *Penal Code*.

The particulars of the said offence are that on the 12th day of February 2013 within Nandi County, the appellant willfully caused the death of her child namely *SK* child aged three days.

The charge was read to the appellant on 15th December, 2013 in English and interpreted in Kiswahili who being called to plead to it stated that, *"It is true"*. The court as would be expected entered a plea of guilty. The prosecutor read facts as follows:-

> ***"On 8th February 2013 the accused left home together with her 3 days old child as her mother went to a nearby shop. While she was at the shop she was informed that the accused had been seen carrying the child to the latrine and she left the latrine without the child. Her mother went home and found the child missing. The mother reported the matter to Nandi Hills police station where investigations were done. The police visited the scene but were unable to retrieve the child. The accused was taken to the Nandi Hills police station and later to Nandi Hills district hospital. A P3 form was filled. It revealed she gave birth. It was produced as Exhbit 1. The accused was then charged".***

The appellant to these facts stated it is true. She was convicted by the court on her own plea of guilty.

The prosecution stated that she was a first offender. She offered no mitigation. The trial magistrate sentenced her to serve life imprisonment.

The appellant dissatisfied with the said conviction and sentence, appealed to this court on the grounds that:-

1. The plea taken before the Honorable learned trial magistrate was equivocal.

2. The Honorable learned trial magistrate erred in law and fact by failing to consider the fact that at the time of the act or omission, the balance of the appellant's mind was disturbed by reason of the appellant not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon birth of the child.

3. The Honorable learned trial magistrate relied on a mental state examination report that was erroneous and misleading and yet the appellant is actually a psychiatric patient with a mental condition and has been attending treatment for several years prior to the time of being charged in court, which fact was not disclosed to the trial court because the accused was not accompanied by any relative during mental examination.

4. The Honorable trial magistrate erred in law and fact by convicting and sentencing the appellant to an excessive sentence while she is a psychiatric patient.

The appellant during the hearing of the appeal called for fresh evidence based on a report dated 20th July, 2011 in which the appellant was

treated at Moi Teaching and Referral Hospital for schizophrenia of which the witness said is a chronic mental illness, characterized by seasons of relapses. During relapse the patient has changes in behavior, thinking and perception. Generally the patient is disconnected from the reality. The appellant was admitted then with complaints of having strangled nephew claiming that she wanted to kill him to prevent him from being tormented by some demons. She claimed that she herself have been tormented by demons and wanted to commit suicide.

However, before the plea was taken on 13th February 2013 appellant was examined by *Dr. Kemboi* from Nandi East District, who was of the opinion that she was mentally, physically and psychologically fit, and was therefore of sound mind and fit to stand trial before the court. Another assessment done of the appellant on 30th July, 2018, at Moi Teaching and Referral hospital indicates that since 2016 she was treated for depression but was at the time mentally stable.

What I have made of the reports is that the appellant is a mental patient who experience some lucid moments. It is therefore hard to state as a fact that during the time of plea taking she did not understand the proceedings. She had been examined and found fit to plead then, and she participated effectively through all motions of plea taking. However I have considered the provisions of *Section 210* of the *Penal Code* on the offence of infanticide which is as follows;-

> ***"Where a woman by any will act or omission causes death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth of the child or by reason of the effect of lactation consequent on the birth of the child, then, notwistanding that the circumstances were such that but for the provisions of this section the offence would have amounted to murder, she shall be guilty of a felony, to wit, infanticide, and may for that offence be dealt with and punished as if she had been guilty of manslaughter of the child".***

Looking at the above provision, it is vivid that the ingredients of the offence does not end with simply establishing that a woman suspect by any willful act or omission caused the death of her child whose age is below 12 months. It must also be established that the suspect at the time of the act or omission had an imbalance of the mind disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent on the birth of the child.

The mental state of the suspect at the time of the act or omission is the one which differentiates the offence of infanticide from that of Murder. The charge particulars need be clear on this to draw a clear line between the two said offences.

The particulars of the offence in this matter reads:-

> ***"On the 12th day of February 2013 within Nandi County, the appellant willfully caused the death of her child namely SK a child aged three days".***

The particulars do not disclose the state of the mind then, of the appellant, and they therefore disclose an offence of murder and not infanticide as charged.

The facts which were read by the prosecutor did not disclose that at the time of the act or omission the appellant had an imbalance of the mind disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent on the birth of the child. The facts as read did not disclose an offence as charged. It is not totally irrelevant to state here that the state of suspect's mind at the time of the act or omission, constituting the offence of infanticide, must be established by an expert and should not be a mere assumption by the investigating officer or the prosecution. There should be an expert report to the effect produced in court by the prosecutor.

ARCHBOLD 2002, Criminal Pleading, Evidence and Practice at page 1629 have given a good example of how statement of offence for the

offence of infanticide should be. It is as follows:-

> ***"AB, on the …day of ….20…., caused the death of her child under the age of twelve months, by a willful act [omission], that is to say, by stabbing him with a knife [by willfully neglecting to...], but at the time of the act [omissions]she had not fully recovered from the effects of giving birth to such child [or from the effect of lactation consequent upon the birth of the child] and by reason thereof the balance of her mind was then disturbed".***

What has come out clearly from the foregoing considerations is that the charge that was read to the appellant was fatally defective and the facts stated to her during the plea taking did not disclose an offence as charged. The plea was therefore equivocal.

The appellant has been in custody since 20th February 2010. There is evidence adduced that she suffers from Schizophrenia and need be catered for in an environment with a lot of love and mostly around people she is familiar with. Given the circumstances, a retrial if ordered

would not meet the ends of justice. I accordingly find the appeal merited. The conviction and sentence against the appellant are quashed. She should be set free forthwith unless otherwise lawfully held.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 5th Day of March, 2019

In the presence of:-

Mr. C.F Otieno holding brief for Mr. Miyienda for the appellant

Mr. Mulamula for state

Mr. Mwelem- Court Assistant