



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 22 OF 2019

BKM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the decision of Peter Kiama, Senior Principal Magistrate, Kangema, in Criminal Case No. 331 of 2019 dated 16th May 2019]

JUDGMENT

1. The appellant pleaded guilty to *procuring her own miscarriage* contrary to section 159 of the **Penal Code**. She was sentenced to *four years* imprisonment.
2. The particulars were that on 13th May 2019 at Nyakianga Sub-Location, Mathiyoa Sub-County in Murang'a County, she "*allowed to be administered with a noxious thing to procure miscarriage of [the] pregnancy*".
3. The petition of appeal raises *four* grounds. Firstly, that the plea of guilt was *equivocal*. Secondly, that the charge was not backed by any medical evidence. Thirdly, that the mitigation was not taken into account; and, fourthly, that the sentence was manifestly excessive.
4. The learned Prosecution Counsel, *Ms. Gichuru*, conceded the appeal.
5. This is a first appeal to the High Court. I have *re-evaluated* the evidence on record and drawn *independent* conclusions. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] E. A. 32.
6. On 16th May 2019 the charge was read out in *English/Kiswahili*, a language the appellant *understood*. She answered: *Ni Kweli [It is true]*. When the facts were read out to her, she said they were "*correct*".
7. Those facts stated that she went into a pit latrine. Thereafter, the hospital staff noticed she was bleeding. She claimed she was on her period. She declined to take a pregnancy test. But the staff noted an umbilical cord hanging out from her privates. They removed the placenta and cleaned up the patient. An officer later discovered the foetus in the pit latrine.
8. But in her mitigation the accused said-

"I took sympathy on my mother who was sickly. I then went to the doctor at Gikoe to assist me. He cleaned me up but did not tell me I had aborted. I thought the foetus had come out but the doctor did not tell me"
9. The accused was obviously *qualifying* the facts. I find that the plea of guilt was *equivocal*. The learned trial magistrate should have entered a plea of *not guilty*. See *Lusiti v Republic* [1976-80] 1 KLR 585, *Desai v Republic* [1974] EA 416, *Adan v Republic* [1973] EA 445.
10. For reasons that will become self-evident, I will not comment on the medical evidence or facts. The judgment of the lower court is impeached for failure of proper *procedure* of taking the plea. The veracity of the evidence was never tested because the appellant pleaded guilty.
11. The appellant was convicted just *two months* before the hearing of this appeal. The sentence provided under section 159 of the **Penal Code** is up to *seven years*. She was sentenced to serve *four years*. Again, I resist the temptation to comment on the sentence.
12. Considering the gravity and nature of the charge, the appropriate and just course to take is to order a *retrial*. There is no injustice or serious prejudice that will be occasioned to the appellant. The interests of justice dictate it. See *Patel Ali Manji v Republic* [1960] E.A. 343,

Ratila Shah v Republic [1958] E.A. 3, ***Hassan Rehman v Republic*** [1976-80] 1 KLR 1243.

13. For all of those reasons, I order that the appellant shall be *retried*. The appellant will be released into police custody. She shall be produced before the Kangema Resident Magistrates Court *within* 10 days of the date of this judgment to take a fresh plea and for retrial by any other magistrate *except* Peter Kiama, Senior Principal Magistrate.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 13th day of September 2019.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of

Mr. Kagwi for the appellant.

Mr. Mutinda for the State.

Ms. Elizabeth, Court Clerk.