



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KABARNET
CRIMINAL APPEAL NO. 128 OF 2017
REPUBLIC
VERSUS
FLORENCE CHELAGAT.....APPELLANT

JUDGMENT

1. The appellant was on 23/2/2015 sentenced to serve three years imprisonment for the offence of child stealing contrary to section 174(1)(b) of the Penal Code. The particulars of the offence were that she had on unknown dates and unknown year at unknown place with intent to deprive MW who had lawful custody of EM aged 10 years of the possession of the said [Child] received or harbored the said child knowingly to have been taken or enticed away.
2. Although the appellant had set out 3 grounds of appeal reading but the trial court had not given her ample time to place her defence, that the court has not considered her mitigation on a plea and the court imposed a non-custodial sentence or reduced sentence, she only urged the prayer for a reduced sentence or non custodial sentence and sought for forgiveness for the offence.
3. The DPP opposed the appeal pointing out that the appellant had stayed with the stolen child for 9 months and that the offence provided for a penalty of imprisonment for 7 years. On the appellant's mitigation that she had a 2 year 7 months old child living outside prison and a 2 year child with whom she lived in prison, the DPP urged that the appellant had not considered the feeling of the parents of the child that she had stolen.

DETERMINATION

4. Although there was no appeal or conviction, I have as first appellant court (*see Okeno v R (1972) E.A 32*) considered the evidence presented before the court and found how the appellant received the child who had been stolen by the sister/cousin Stella, with or without prior agreement as to the theft of the child. She lives with the child subsequently and indeed dealt with her in a manner consistent with the particulars of the offence of depriving the person who had lawful custody of the child her rights of possession of the child by employing her as a baby sitter and bringing her to Kabarnet with her while she (appellant) sought casual jobs.
5. I would consequently partly agree with the trial court when it finds in its judgment that:

“The accused had knowingly kept the child for with prior knowledge that the child was neither hers nor her sisters. The intention of the accused is clearly that she had wanted to use the child as a domestic help and she had prior knowledge of her sister's doings. This was a move that had been well calculated and the accused and her sister had conspired to have the child taken from her

rightful parents. Although the accused was not involved in directly stealing the child she had opted to harbor and conceal or keep a child whom in her mind she knew was not hers”.

6. I will find the appellant’s responsibility diminished to the extent that it was not proved that they conspired to have the child stolen. She could have been a beneficiary of the theft who became an accessory after the fact of stealing. I think that his distinction is important in assessing moral blameworthiness of the appellant for purposes of assessing the appropriate sentence.

7. I consider objectively that the want of evidence of prior conspiracy, the diminished blameworthiness in not having taking part in the actual theft of the child and the fact that she is the one who reported the case of the stolen child’s defilement to the police to be facts to be considered in assessing the appropriate sentence for the appellant – the appellants own circumstances of having a young child was also crucial.

8. In sentencing the appellant, it is clear that the trial court relied wholly on the probation officer’s report and practically abdicated her responsibility to sentence to the probation officer. The probation officer’s report is only for presentation of the facts and circumstances surrounding a case, which is usually given without oath and it is only for the guidance of the court as it considers appropriate sentence.

A court cannot properly surrender its discretion as to sentence to a probation officer’s report, the court of appeal in ***Kyalo v. R (2009) KLR 325*** has cautioned as to the use of Probation Officer’s Report.

9. The proceedings on the 23/2/2015 when the matter came up for sentencing is as follows:-

“COURT: I have seen the probation Officer’s Report and also considered the fact that the accused is a first offender. Probation Officer’s Report – The accused’s plan to conceal retain and exploit the minor seems to have been calculated between her and her cousin and thanks for the attempted defilement case. This requires deterrence in pursuit to protect children and the accused is recommended to be dealt with otherwise.

COURT: The accused is hereby sentenced to serve three years imprisonment.

10. Obvious, the trial court left decision on sentence to the probation officer. The probation officer’s report is a second finding of guilt of the appellant and it does nothing to report on the circumstances of the appellant for purposes of alternative method of penal treatment by way of Probation, Community Service Order or imprisonment, among others.

11. While this court takes services in view of the offence of child stealing as perhaps taken by the trial court and the probation officer, I consider that had the court objectively taken into account the circumstances of the offence, the appellant’s situation as regards having a child which the stolen child was babysitting and the fact on report to the police of the attempted defilement (according to the probation officer) of the stolen child by the appellant and factors reducing the appellants blameworthiness, the trial court might have imposed a lesser sentence. (***See Omuse v. R (2009) KLR 214.***)

12. Accordingly, for reasons set out above, and noting that the appellant has served (2) of her three year sentence, I consider that an order for Community Service may be appropriate.

13. In accordance with Community Service Orders Act s. 3(3) the court will before making an order for Community Service Order consider, a Community Service Officers Report on the circumstances of the appellant and on the suitability for such order.

ORDERS

14. The appeal shall be mentioned on 3rd April, 2017 for the receipt of the Community Service Officer’s Report and for further orders.

DATED AND DELIVERED THIS 20TH DAY OF MARCH 2017.

EDWARD M. MURIITHI

JUDGE

Appearances:

Applicant in person

Ms. Kenei for DPP