REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 65 OF 2015

Rose Wachuka Kibe.....Appellant

Versus

Republic.....Respondent

(Appeal against conviction and sentence in Criminal case number 241 of 2012,

R vs. Rose Wachuka Kibe at Mukurweini delivered on 28.3.2013

by Hon. Wendy Kagendo, S.P.M.).

JUDGEMENT

The appellant was tried and convicted the offence of killing an unborn child contrary to Section **228** of the Penal Code[1] and was sentenced to serve **10** years imprisonment.

At the hearing of the appeal the appellant stated that she only wished to proceed against the sentence and urged the court to consider the sentence imposed, that she is truly remorseful and has spent **2** years and **11** months in jail, that she suffers from high blood pressure and has chest problems. She also stated that she left two children aged **3** years and **5** years and there is no one to care for them, that her sister is married and is not able to provide for them, that she has no parents and she swore never to commit an offence again.

Miss Chebet, Prosecution counsel opposed the appeal, and urged the court to up hold the sentence. Counsel maintained that the offence attracts a penalty of life imprisonment and that she was sentenced to ten years imprisonment.

Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously.[2] In *Shadrack Kipchoge Kogo vs Republic*,[3] the court of appeal stated:-

> *"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong*

principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"

Learned state counsel was of the view that the sentence imposed in this case is reasonable and below the sentence prescribed by the law of life imprisonment. But the question that needs to be addressed is, *"What is the construction of the terms shall be liable?* In searching for the intention of parliament, the first observation to make is that generally speaking, the penalty prescribed by a written law for an offence, unless a contrary intention appears, is the maximum penalty.[4] This principle is contained in section **66 (1)** of the Interpretation and General Provisions Act[5]which provides:-

"Where in a written law a penalty is prescribed for an offence under that written law, that provision shall, unless a contrary intention appears, mean that the offence shall be punished by a penalty not exceeding the penalty prescribed"

My further observation is that the principle of law in Section **66** aforesaid is entrenched in Section **26** of the Penal Code[6] which expressly authorizes a court to sentence the offender to a shorter term than the maximum provided by any written law and further authorizes the court to pass a sentence or a fine in addition to or in substitution for imprisonment except where the law provides for a minimum sentence of imprisonment. In particular, Section **26 (2)** and **(3)** of the Penal Code[7] provides:-

(2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other shorter period may be sentenced to any shorter term.

(3) A person liable to imprisonment for an offence may be sentenced to a fine in addition to or in substitution for imprisonment.

There is however a proviso to Section **26(3)** that a fine cannot be substituted for imprisonment where the law concerned provides for a minimum sentence of imprisonment. In my view, from the wording and language of Section **26** and **28** of the Penal Code, it is clear that those are general provisions of law which apply not only to the offences prescribed in the Penal Code[8] but to offences under other written laws.[9]

The phrase used in penal statutes *(ie shall be liable to*) was judicially construed by the East African Court of Appeal in *Opoya vs Uganda*[10] where the court said at page **754** paragraph **B**:-

"It seems to us beyond argument the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it"

I find that the sentence of life imprisonment prescribed for the offence in question is not mandatory, and that in determining the sentence, the court has to consider the facts and circumstances of the particular case and in particular be guided by the principles governing the imposition of punishments.

The Supreme Court of India in *State of M.P. vs Bablu Natt*[11]stated that '*the principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with.'* Moreover, in *Alister Anthony Pareira vs State of Maharashtra*,**[12]**the court held that:-

"Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other

attendant circumstances"

Thus, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.[13]

I have carefully considered the facts of this case, the nature of the offence and the above principles and the plea by the appellant to this court to reduce the sentence, and her passionate submission in court that she suffers from high blood pressure and chest problems, that she left behind two minor children with no one to take care of them, that she is truly remorseful and will never repeat the offence. Also I have considered the principles of sentencing under the common law[14] and the sentencing policy guidelines and the fact that the appellant has been in jail for **2** years and **11** months.

I find that the ends of justice will be met if I reduce the sentence. Accordingly, I hereby reduce the sentence of **10 years** imposed upon the appellant to the period already served and order that the appellant *Rose Wachuka Kibe* **be released from prison forthwith unless otherwise lawfully held.**

Dated, Signed and Delivered at Nyeri this **4th** day of **March** 2016

John M. Mativo

Judge

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[1] Cap 63, Laws of Kenya

[2]See Makhandia J (as he then was in Simon NdunguMuragevs Republic, Criminal appeal no. 275 of 2007, Nyeri.

[3]Criminal Appeal No. 253 of 2003(Eldoret), Omolo, O'kubasu&Onyango JJA)

[4] See Daniel KyaloMuemavs Republic, Court of Appeal Criminal appeal no. 479 of 2007 (Nairobi), Githinji, Anganyanya&Nyamu JJA.

[5] Cap 2, Laws of Kenya

[6] Cap 63, Laws of Knya

[7] Ibid

[8] Ibid

[9] Supra note 3

[10] {1967}E.A 752

[11] {2009}2S.C.C 272 Para 13

[12] {2012}2 S.C.C 648 Para 69

[13] See Somanvs Kerala {2013} 11 SC.C 382 Para 13, Supreme Court of India

[14] Regina vs MA {2004}145A