



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kayegi v Republic (Criminal Appeal E117 of 2023)  
[2024] KEHC 8962 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 8962 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL E117 OF 2023  
AB MWAMUYE, J  
JUNE 27, 2024**

**BETWEEN**

**SUSAN KAYEGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the Judgment, Conviction and Sentence of the Hon. G. Omodho (PM) delivered on 14th September, 2021 in Kiambu CM CR. No. E889 of 2021)*

**JUDGMENT**

1. The Appellant, Susan Kayegi, was charged with the offence of infanticide contrary to Section 210 as read together with Section 205 of the Penal Code. The particulars of the offence as stated on the Charge Sheet were that on 15<sup>th</sup> April, 2021 at around 06:00hrs at Kiamumbi Estate within Kiambu Sub-County, Kiambu County, the appellant unlawfully killed a five days old infant and thereafter dumped the infant in a pit latrine within the same estate.
2. The Appellant was arrested on 23<sup>rd</sup> April, 2021. After being presented to Court on 26<sup>th</sup> April, 2024, she was placed in remand for 14 days; returning to Court on 10<sup>th</sup> May, 2021. On that day, the Appellant plead guilty.
3. The facts read by the Prosecution were that the deceased infant was delivered on 9<sup>th</sup> April, 2021 as per the information of the Appellant's next-door neighbour. It was said that the Appellant's husband, a Mr. Hussein, and who was not the biological father of the new born, told the Appellant to take the infant to the infant's biological father and return to the matrimonial home without the infant. It was stated that the Appellant's husband gave her KShs. 500.00 for bus fare and she travelled to Limuru to seek out her ex-boyfriend. The Appellant was initially unable to trace her-ex boyfriend but they met the following day. The ex-boyfriend promised to deal with the issue after work but he did not return, leaving the Appellant stranded.



4. On 12<sup>th</sup> April, 2021 she returned to the matrimonial home and it is said that she and Mr. Hussein decided to kill the baby. Thereafter, the Appellant dumped the baby in a pit latrine at Stima Lane.
5. It was further said that on 23<sup>rd</sup> April, 2021 the lack of a baby's cries aroused the suspicions of the neighbours. Upon visiting the Appellant's home, the neighbours discovered that the baby was missing, leading them to report the disappearance to the Police. Upon the arrival of law enforcement officers, the Appellant tried to escape but was apprehended and taken to hospital. The body of the deceased child was recovered from the pit latrine with the Appellant's help and the body was thereafter taken to City Mortuary.
6. During the court of appearance of 10<sup>th</sup> May, 2021, the Prosecution informed the Court that there was a 'mental report' with respect to the Appellant that indicated that she was unfit to plead. A fresh assessment was ordered by the Court, and the Appellant was remanded to Langata Women's Prison for a further 30 days for further treatment and review. A fresh mental examination report was to be availed at the mention date of 31<sup>st</sup> May, 2021.
7. On 31<sup>st</sup> May, 2021 the Appellant was absent and the Court was also not sitting. The matter was mentioned on 14<sup>th</sup> June, 2021 and the Prosecution informed the Court that while the report was ready, they did not have it at hand. With no objection from the Appellant, the matter was put down for further mention on 23<sup>rd</sup> June, 2021 for the production of the mental examination report.
8. On 23<sup>rd</sup> June, 2021 the Court observed that the report was available and the Appellant was fit to plead. The charges were read and explained to the Appellant in Kiswahili and she plead guilty. The Prosecution informed the Court that it needed time to obtain the facts and exhibits. The Appellant did not object and the matter was stood over to 30<sup>th</sup> June, 2021. However, on 30<sup>th</sup> June, 2021 the Prosecution could not proceed and the matter was slated for further mention on 1<sup>st</sup> July, 2021; with no objection from the Appellant.
9. On 1<sup>st</sup> July, 2021 the facts were read to the Appellant once more. The Trial Court's record shows some variation between the facts read on that day and those read on 10<sup>th</sup> May, 2021. The two main points of departure were that the date of the commission of the offence was now given as 15<sup>th</sup> April, 2021 rather than 12<sup>th</sup> April, 2021, and that the involvement of Mr. Hussein in the decision to kill the baby was now not present in the subsequent narration of facts. The Appellant stated that the facts were true and she was convicted on her own plea of guilty. In mitigation, the record states that the Appellant said:

“I seek forgiveness from court.”
10. The matter came up for sentencing on 14<sup>th</sup> July, 2021. The Trial Court noted that the Appellant was a first offender who had taken the life of her own child who was less than 10 days old. In applying its mind as to what would be an appropriate sentence, the Trial Court stated as:

“Considering the circumstances under which the offence was committed, she took away life then concealed evidence by disposing the body in a pit latrine, how sad! The accused seemed to have issues with her spouse, but why should the innocent infant be sacrificed in a love affair. It is hard to fathom. The offence herein is serious, very serious, much as the accused sought forgiveness.

The mischief in this offence is treatable in law which I will not hesitate to apply as prescribed under Section 205 of the Penal Code.

The accused shall serve life imprisonment. Right of appeal 14 days.”



11. Having set out the background to the matter, this Court's duty is to evaluate and scrutinize the evidence and proceedings on record and reach its own independent conclusion. I have considered the trial court's proceedings, the undated Petition and Grounds of Appeal, the Appellant's undated 'Submissions and Supplementary Grounds', and the Respondent's Written Submissions dated 14<sup>th</sup> June, 2024. It is clear from all of filings in this appeal that the sole issue for determination is whether the sentence meted out by the trial court was excessive. I say so because I am also satisfied from the proceedings of the trial court that the plea of guilty was unequivocal and properly entered, and thus I do not need to delve into that arena.
12. Before addressing this sole issue for determination, I note that this appeal was lodged outside the statutory timeframe. However, the appellant prayed for its extension and explained the reasons for the same in the undated Petition as well as the appellant's submissions. The respondent did not oppose the admission of the appeal out of time. Consequently, this Court enlarged time and the appeal was duly admitted for hearing and determination.
13. The principles that guide an appellate court in its appraisal of a sentence are well established. The Court of Appeal for East Africa in the case of *Ogola S/o Owoura v Reginum*, [1954] 21 270 set them out in the following words:

"The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in *James v R*, [1950] 18 E.A.C.A 147:

"It is evident that the Judge has acted upon some wrong principle or overlooked some material factor."

To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R. v Sher Shewky*, [1912] C.C.A. 28 T.L.R. 364."
14. An appellate court such as this Court can only interfere with the sentencing discretion of the Trial Court only if:
  - a. The sentence was manifestly excessive in the circumstances of the case; or
  - b. The Trial Court overlooked some material factor that it ought to have considered in sentencing; or
  - c. The Trial Court considered material or factual matters that it ought not to have considered in sentencing; or
  - d. The Trial Court proceeded on an incorrect principle of law.
15. It is not sufficient that the appellate court would have arrived at a different sentence from that which was imposed by the trial court. One or more of the four criteria stated in Paragraph 12 above must exist for the appellate court to interfere with the sentence.
16. In the present Appeal, I am satisfied that the Trial Court erred by not taking into account relevant material facts such as the young age of the Appellant as well as her personal circumstances; and at the same time taking into account factual matters that it ought not to have. This led to the Trial Court imposing a sentence that was manifestly excessive and at a very wide variance with sentences imposed on other offenders guilty of identical crimes.



17. It is clear to this Court that the Appellant is remorseful and she is willing to turn her life around. At 25 years of age, she has expressed her desire to start a family and re-join society as a reformed and productive member of the community. The Appellant, while having made progress, will no doubt require further assistance in her journey of reform and transformation. Having been in remand and incarceration continuously from the date of her arrest on 23<sup>rd</sup> April 2021 to date, a period of more than 3 years; I find that the Appellant has served sufficient time in custody.
18. Consequently, this Appeal succeeds to the extent of sentence alone. I set aside the sentence of life imprisonment and I substitute it with 1 year probation sentence, having noted the time the Appellant has already served in custody from the date of arrest to the date of this judgment. During that 1-year term of probation, the Appellant shall attend mandatory counselling and socio-economic empowerment training as directed by the Probation Officer.
19. The Appellant is hereby released forthwith and is to be handed over to the Probation Officer, unless held for some other lawful reason.
20. Appropriate actions to be taken accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI**

**THIS 27TH DAY OF JUNE, 2024.**

**BAHATI MWAMUYE**

**JUDGE**

**In the presence of:**

Appellant: Susan Kayegi (In person)

Mr. Imran Counsel for the Respondent

Mr. Guyo, Court Assistant

