REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 118 OF 1994

STEPHEN NYABIOSI NTABO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence of the Chief Magistrate's Court at Kisii in Criminal Case No 1283 of 1994 - Kathoka Ngomo Esq SRM)

JUDGMENT

The appellant was convicted on his own plea of guilty in the court below of attempting to procure abortion c/s 158 of the Penal Code and was sentenced to 4 years imprisonment. His appeal to this Court is against conviction and sentence.

In his petition of appeal filed through M/S Nyamweya Advocates, the appellant complains that the plea of guilty was equivocal, that the charge was duplex and that the sentence was harsh and excessive. It is also alleged in the petition that the learned trial magistrate erred by observing that the appellant caused loss of human life and that he did not respect the sanctity of human life. Lastly, it is claimed that the appellant's mitigation was not considered.

In his submission Mr Osoro who argued the appeal on behalf of the appellant combined the complaint regarding the clarity of the plea with that about duplicity. He submitted that section 158 of the Penal Code creates two alternative offences and that the charge as laid alleged two offences in one count this presumably offending section 135 of the Criminal Procedure Code. In my view Mr Osoro's submission was not quite correct.

The section creates several offences namely:-

(i) unlawfully administering etc;

(ii) causing her to take etc;

(iii) using any force of any kind; or

(iv) using any other means, with intent to procure a miscarriage of a woman.

The particulars of the charge of which the appellant was convicted alleged:-

"Between 1st and 4th day of April 1994 at Nyamaramba sub location in Kisii district of the Nyanza province, jointly with intent to procure the miscarriage of a woman namely Pamela Oumo Gitebe unlawfully administered to the said Pamela Oumo Gitebe or caused Pamela Oumo to take a poison and caused her death."

It is clear from the above particulars that the count contains two offences ie unlawfully administering poison or causing Pamela to take poison, and to that extent the charge is duplex. But the facts that the prosecutor proceeded to give after the plea was formally entered show beyond any doubt that the offence that the prosecutor alleged was committed by the appellant was " causing her to take poison or other noxious thing" to wit the tablets. There is no doubt about that and the appellant cannot be said to have been under any misapprehensions as to what offence he was facing. And so, when he admitted the facts and was subsequently convicted, he must have been fully aware of what was going on. The plea was clear and unequivocal and the complaint about how it was taken lacks substance.

As to the duplicity of the charge, that did not lead to any miscarriage of justice. The appellant understood what charge he faced. In any event the error was minor and is curable under section 382 of the Criminal Procedure Code.

With respect to the complaints regarding sentence, the notes on sentence, the learned trial magistrate clearly felt strongly about the death of the woman and he thought the appellant deserved a deterrent sentence. In my view the learned trial magistrate was perfectly entitled to those views. In all the circumstances of the case the sentence meted out cannot be said to have been either harsh or excessive and there is no basis for interfering.

The appeal against conviction and sentence is dismissed.

Dated and Delivered at Kisii this 27th day of October 1994.

T.MBALUTO

JUDGE