REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CRIMINAL APPEAL NO. 45 OF 2020

(Appeal arising out of conviction and sentence of Hon. M. N. Lubia (Resident Magistrate) in Kitale Chief Magistrate's Court Criminal Case No. 3110 of 2019 delivered on 15th May 2019)

DWM.....1ST APPELLANT

BAM.....2ND APPELLANT

KS.....3RD APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

On the night of 13th May 2019 at 02.00 a.m. in Kachibora Trading Centre, DWM, SBO, GOE, BAM and KS gained entry into Tulin Stores Limited. The 1st Appellant together with one SBO proceeded to disconnect the CCTV surveillance as well as the security alarm. They thereafter broke the windows to gain access to the said supermarket. One GOE was on the lookout on the east side of the supermarket facing the Police Station. The 2nd Appellant stood outside the supermarket while the 3rd Appellant was on the west side facing the direction of the AP Camp. The Appellants thereafter together with the two other persons proceeded to enter the supermarket. They took the following items:

a. 6 Techno assorted model mobile phones;

b. 1 Infinix mobile phone;

c. 1 Huawei mobile phone;

d. 3 Samsung assorted model mobile phones;

e. 2 X-Tigi mobile phones;

f. 1 Itel mobile phone;

g. 4 Nivea men perfume bottles;

h. 1 Nivea roll on;

i. 1 Clare men lotion;

j. 8 flash disks;

k. 14 assorted mobile phone screen protectors;

l. 4 memory cards;

m. Kshs. 420.00

Having collected the said items, the accomplices proceeded to the home of the 1st Appellant. The items were shared and distributed amongst themselves; particularly, the 1st and 2nd Appellants together with one GOE retained the mobile phones and the flash disks. The Complainant would later on discover that her supermarket was broken into. She further observed that some of the inventory was missing. Consequently, she made a report to the Police Station who commenced investigations. Police officers upon establishing the whereabouts of SBO proceeded to arrest him. He disclosed the whereabouts and names of his co-accomplices; the Appellants herein included. The missing items listed by the Complainant were recovered and positively identified at Cherangany Police Station.

The Appellants herein were subsequently charged with the offence of **breaking into a building and committing a felony** contrary to **Section 306 (a)** of the **Penal Code**. The particulars of the offence were that on 13th May 2019 at Kachibora Trading Centre in Trans-Nzoia East Sub County within Trans-Nzoia County, the Appellants jointly (with two others) broke and entered the supermarket namely Tulin Stores Limited of Winnie Cheptoo Koech and stole therein the following items: 9 Techno mobile phones of different models, Infinix and Huawei mobile phones, 3 Samsung mobile phones of different models, 2 X-Tigi phones, perfumes, 8 flash disks, 4 memory cards and 14 screen guards all valued at Kshs. 156,350.00. In the alternative, the Appellants were charged with **handling stolen goods** contrary to **Section 322 (1) (2)** of the **Penal Code**. The particulars were that on 13th May 2019 at Kachibora Trading Centre within Trans-Nzoia County, the Appellants jointly (with two others) otherwise than in the course of stealing dishonestly retained 13 mobile phones of assorted makes, flash disks, one school bag, one long trouser, Nivea perfumes, memory cards and 14 screen protectors all valued at Kshs. 140,810.00.

The Appellants faced a second count of **Malicious damages to property** contrary to **Section 339 (1)** of the **Penal Code**. The particulars of the offence were that on the 13th day of May 2019 at Kachibora Trading Centre within Trans-Nzoia County, the Appellants jointly (with two others), willfully and unlawfully damaged CCTV camera and alarm bells all valued at Kshs. 76,000.00 the property of Winnie Cheptoo Koech.

When the Appellants were arraigned before the trial magistrate's court, they pleaded not guilty to the second count. They however all pleaded guilty to the first count. The facts were read as produced herein save to add that only 1 X-Tigi phone was recovered and 3 out of the 8 flash disks were recovered.

After the facts were read out, the 1st Appellants confirmed the veracity of the facts as read save that they only stole 1 X-Tigi phone; he entered the supermarket with SBO while the others remained outside; they stole 3 and not 8 flash disks and that the phones produced in evidence were the only ones they stole. The other Appellants associated themselves with the admission by the 1st Appellant. The court then pronounced itself and the same is reproduced thus:

> "**The accused persons have been found guilty based on their own plea of guilt and admission of facts save to slight clarifications and on the positive identification of the exhibits before court as having been retrieved from their possession**. Accused 1, 3, 4, and 5 are **accordingly convicted for the offence of breaking into a building and committing a felony contrary to Section 306 (a) of the Penal Code. I direct that age assessment is conducted on accused 2 to ascertain his age on the face of it, he appears to be a minor."**

The Appellants in their mitigation stated as follows:

"1st Appellant: my siblings depend on me. It was peer pressure that lead to this crime. I am sorry.

2nd Appellant: I am a student. I have visions. I am sorry.

3rd Appellant: I was raised by my grandmother. I am a student. I am sorry."

The court thereafter sentenced the Appellants to **5 years imprisonment**. The court rendered itself as follows:

> "**It is very sad and very disheartening to see such young persons aged 18 and 19 years engage in a very serious and heinous crimes. Their actions need to be curtailed for the betterment of our society …. Let this serve as a lesson and deterrence to both the accused persons and to other youth**."

The Appellants now challenge the trial court's decision. The 1st and 3rd Appellants have raised similar grounds of appeal against their conviction and sentence. Their appeals and applications for revision shall consequently be consolidated. The 2nd Appellant only challenges the sentence the trial court meted on him.

This being a first appeal, it's the duty of this court to re-consider and to re-evaluate the evidence adduced before the trial magistrate's so as to reach its own independent determination, whether or not to uphold the conviction of the Appellant. In doing so, this court is required to be mindful that it neither saw nor heard the witnesses as they testified and therefore cannot make any comment regarding the demeanour of the witnesses **(See Njoroge -vs Republic [1986] KLR 19).** In the present appeal, the issue for determination by this court is whether the Prosecution established to the required standards of proof that the Appellants committed the offence that they were charged with. This court shall proceed to consider and determine the appeals as hereunder:

2nd Appellant's Case

The 2nd Appellant seeks a revision of the sentence meted out against him; he prays for a non-custodial sentence. In support of this, the 2nd Appellant states that he co-operated with the trial court by pleading guilty; he was a first offender; he was remorseful; he was a minor; he was intent on pursuing his basic education; the trial court failed to consider his mitigation.

During the hearing of the appeal, the Appellant fortified his written submissions with oral presentations. He stated that he was a form four student at [particulars withheld] Boys High School Osorongai. He wanted to repeat K.C.S.E. He was remorseful. He promised to steer clear off bad company that initially lured him into committing the offence. He was in custody for three (3) months between May and August 2019. Mr. Omooria for the State opposed application for revision of sentence. He stated that the sentence was proper. He urged this court to uphold the court's findings and dismiss the application.

This court has been tasked to reconsider the sentence meted out against the 2nd Appellant. On perusing the proceedings at trial, this court finds that indeed the plea of guilty entered by the 2nd Appellant was unequivocal. The trial court entered the said plea having satisfied itself that indeed the 2nd appellant admitted to the offence. This court thus finds no reason to interfere with the same.

The 2nd Appellant urges this court to grant him a non-custodial sentence. The reasons preferred have been reproduced above herein. At the time of committing the offence, the 2nd Appellant says he was eighteen (18) years old. He was a form four student. These facts are evinced from the 2nd Appellant's student identification card. The trial court considered his mitigation before sentencing him to serve (5) years imprisonment. It was the trial court's considered view that the sentence meted out served a deterrence purpose. This court finds no reason to interfere with the reasoning of the trial magistrate. The 2nd Appellant admitted the offence. He can still continue with his education while incarcerated. He has not furnished any cogent reasons to warrant a review of his sentence to a non-custodial one. He is however remorseful. He is a first offender. He is intent on living by example to his peers. Some of the stolen items were recovered. He has made a case for this Court's exercise of its discretion. In view of the foregoing, this court shall exercise its discretion under **Section 354 (3)** of the **Criminal Procedure Code** and set aside the said custodial sentence and substitute it with a sentence **2 years imprisonment** effective the date he was sentenced. Since that period has expired, his sentence is commuted to the period served.

1st and 3rd Appellants case.

The Appellants challenge the conviction and sentence of the trial magistrate. They contend that they were minors at the time of the offence; they were wrongly convicted as the trial court failed to inquire into their age; the resultant convictions were in flagrant violation of the **Children Act**; they were wrongly sentenced to serve five (5) years imprisonment as they were minors; the trial court failed to make considerations on the second count which they pleaded not guilty; the law does not provide for conviction, sentence and imprisonment of a minor; their educational rights were infringed following the conviction and custodial sentence.

During the hearing of the Appeal, Ms Munialo, Counsel for the 1st Appellant observed that the revision filed on behalf of his client was converted into an appeal on the orders of this court. She stated that the plea entered was equivocal. The facts did not tally with the charge. The plea should have been changed as there were slight clarifications tabled by the 1st Appellant when the facts were read out. The facts on the second count were not read out to his client. Counsel contended that the money recovered from the 1st Appellant was not conclusively indicative that the same was stolen from the complainant. He stated that the charge sheet was defective. The 1st Appellant was a minor at the time the offence was committed. It is for this reason that bail was granted pending trial. He was arrested and arraigned in court while in school uniform. According to his birth certificate and school report, the 1st Appellant was born on 21st September 2001. He was seventeen (17) years seven (7) months at the time of the offence. He should not have been ordered to serve a custodial sentence. He faulted the trial court for failing to issue an order for age assessment to be done. Finally, the charge against the 1st Appellant was not proved to the required standard of proof beyond reasonable doubt. He cited the case of **C.A. No 14 of 2015; Hussein Ali –vs- Republic** for the proposition that the trial magistrate erred in convicting the 1st Appellant as the facts read out were slightly disputed.

Ms. Arunga, Counsel for the 3rd Appellant concurred with the submissions of the 1st Appellant and urged this court to allow the appeal.

Mr. Omooria for the State opposed the appeals. He stated that the Appellants admitted the charge, the plea was properly taken, the particulars were read out and the facts were confirmed by the Appellants as true. It was his considered view that an appeal on sentence only was eligible to the Appellants as the conviction was proper. On allegations that the 1st Appellant was seventeen (17) years old, the Learned Prosecutor cited **Section 14 (2)** of the **Penal Code** for the proposition that he was criminally responsible as he was above twelve (12) years of age. He thus urged this court to dismiss the appeals and uphold the findings of the trial court.

In brief rejoinder, Mr. Munialo stated that **Sections 186 – 190** of the **Children Act** outlaws convictions and sentences against minors. Since the charge and facts did not tally, a plea of not guilty ought to have been entered.

This court has considered the rival submissions presented by the parties herein. The court has also taken the liberty to look at the trial court's proceedings when the plea of guilty was entered. This court postulates that the following issues fall for determination:

1. Whether the plea taken was unequivocal

When the Appellants were arraigned before the trial court to enter a plea on the charges preferred against them, they all pleaded guilty to the first count. The facts were then read out to the Appellants. The Appellants conceded to the facts save to clarify that they stole only stole 1 X-Tigi phone. It was the 1st Appellant that entered the supermarket with SBO while the others remained outside. They stole 3 and not 8 flash disks. The Prosecution further affirmed that they only recovered 1 X-Tigi phone and 3 of the 8 flash disks that were reported stolen. The trial court observed that there were only slight clarifications to the facts. The court was satisfied as to the crucial facts which were in tandem with the charge sheet. The Appellants confirmed the facts as true and did not change their plea. It is on the strength of these proceedings that the Appellants challenge the plea entered.

The plea is challenged on grounds that there were clarifications made on the facts. The Appellants contend that the plea ought to have been changed on that account. The leading decision on how plea of guilty should be recorded (as per SPRY V P) is **Adan vs. Republic 1973] EA 445** . The court held:

> **"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must of course be recorded."**
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> **The proceedings at trial show that the charge was read out in English and Kiswahili. They were read in languages that the Appellants understood. The facts were read out. There were slight variations to what appeared in the charge sheet. This court finds that the clarifications made by the appellants did not affect the veracity and the basis upon which the plea of guilty was recorded. The appellants admitted the substance and crucial elements of the charge preferred against them. This court thus finds that the plea of guilty that was recorded was unequivocal.**

2. Whether a minor aged seventeen (17) years at the time of the offence can be held criminally responsible

The Appellants contend that the trial court ought to have made orders to have age assessment reports furnished before them before sentencing the Appellants. This is because both Appellants were seventeen (17) years old at the time of the offence. The trial court estimated the age of the two Appellants as to fall between eighteen (18) and nineteen (19) years old. On this premise, no age assessment was done. This court ordered for an age assessment to be done. According to the age assessment reports, both the 1st and 3rd Appellants were seventeen (17) years of age at the time of the offence. Furthermore, the 1st Appellant's birth certificate indicates that he was born on 27th September 2001 while that of the 3rd Appellant indicates that he was born on 17th September 2001. It cannot be gainsaid that indeed the Appellants herein were minors at the time of the offence. The 1st Appellant was a form three student at [particulars withheld] Secondary School while the 3rd Appellant was a form one student at [particulars withheld] Boys High School.

It is the Appellants' contention that they ought not to have been arrested, charged, convicted and sentenced to the said offence given the fact that they were minors. Consequently, the trial court violated the provisions of **Section 186 – 190** of the **Children's Act**. Conversely, Learned Prosecutor stated that by dint of **Section 14 (2)** of the **Penal Code**, the Appellants were capable of being held criminally culpable for the offence.

Section 14 (2) of the **Penal Code** sets out the common law rebuttable presumption of *doli capax.* Essentially, any person above the age of twelve (12) years in the Republic of Kenya is deemed to be criminally liable in the event an offence is committed. In that regard, the 1st and 3rd Appellants having attained the age of seventeen (17) years at the time of the offence, met the threshold. To this court's mind, they were capable of meeting any criminal responsibility held against them. The law only departs from the general overview of offenders regarding sentencing of minors. It is for this reason that the trial court erred in committing the Appellants to imprisonment. They had not attained the age of majority at the time of the offence.

The Appellants further remain dissatisfied with the proceedings at trial court on the second count. The Appellants contend that the facts were not read out after they entered their plea. However, this court notes from the proceedings that the Appellants entered a plea of not guilty. This was an alternative charge. Once the appellants pleaded guilty to the main charge, the alternative charge fell by the wayside. It was no longer available for the prosecution to try it.

This court finds that indeed plea of guilty entered by the 1st and 3rd Appellants was unequivocal. This court thus finds that the appeal against the convictions lack merit. The appeals against conviction fails and are hereby dismissed.

The Appellants were under the **Penal Code** sentenced to five (5) years imprisonment each. It has however been pointed out that the Appellants were minors at the time of the offence. To this extent thus, it was wrong in principle for the trial court to commit the Appellants to imprisonment. Under **Section 190 (1)** of the **Children's Act**, **"no child shall be ordered for imprisonment or to be placed in a detention camp."** These provisions are couched in mandatory terms. It was the trial court's duty to confine itself within the available options found in **Section 191** of the **Children Act.** To this extent, the Appeal succeeds. However, since the said minors had already served some time in prison (between three and four months) this court formed the view that they have been sufficiently punishment. The respective custodial sentences that they had served is commuted to the period served. Since the Appellants were on bail pending the delivery of this judgment, they are accordingly discharged. It is so ordered.

DATED AT KITALE THIS 23RD DAY OF SEPTEMBER 2021

L. KIMARU

JUDGE