

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO.E003 OF 2021

JWAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being Appeal from the judgment, conviction and sentence of Hon. R. Odenyo, Senior Principal Magistrate delivered on 9/12/2020 in Eldoret CM Cr. Case No.E938 of 2020)

JUDGMENT

1. The Appellant herein being dissatisfied with the judgment, conviction and sentence of Hon. R. Odenyo, Senior Principal Magistrate delivered on 9/12/2020 in Eldoret Chief Magistrate Court in Criminal Case No.E938 of 2016 has preferred an Appeal on the grounds set out in the Petition of Appeal at page 4 and 5 of the Record of Appeal.
2. This being the first Appeal, this Court is expected to re-evaluate the evidence tendered before the trial court and to come to its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or demeanor. The Court is guided by **Okeno v Republic [1972] EA 32 and Pandya v Republic [1975] E.A.336**.
3. The Appellant submitted that the trial Court did not satisfy itself that the accused person was a minor before convicting by failing to call for age assessment of the accused. This is a very important issue. I have looked at the record. It was wrong for the trial Court to have proceeded with the trial without first calling for age assessment report of the Appellant and had the trial Court done that, it would have discovered that the Appellant was a minor as evidenced by the acknowledgment of birth annexed to the Appellant's application for bond dated 30/12/2020. The Court ought to have proceeded with extra caution thus the guilty plea is not safe given the circumstances. On this ground alone the Appeal herein is merited.
4. However, more importantly, the prosecution has conceded the Appeal, stating that the Appellant was charged with the offence of stealing farm produce contrary to section 8 (1) of the Stock and Produce Theft Act. The particulars being that on the 8th day of December 2020 at Ngeria farm in Eldoret South sub-county, stole three sacks of maize cobs which was the property of Leonard Sile. When the charge was read out to him, the Appellant speaking in Kiswahili language, pleaded guilty. When the facts of the case were duly read to him, he indicated that the facts were correct thus prompting the court to enter plea of guilty. The prosecution indicated that there were no prior records on the accused person. He was then given a chance to mitigate before being sentenced to imprisonment for a period of 2 years. He seems to have taken umbrage at the manner in which the plea of guilty was entered and thus appeals the entire judgment and conviction.
5. However, the Respondent concedes to the Appeal on the ground that the sentence was excessive. Counsel for the Appellant availed birth notification serial no.xxxxxx in respect to a child named JWS. It indicates that the date of birth is 29/7/2003. Therefore, at the time of committing the offence, he was 17 years old and thus still a minor. Regrettably, a social inquiry was not conducted on him before he was sentenced and this seems to have denied the court a chance to determine the age.
6. The restriction on punishment for children in conflict with the law is contained in section 190 (1) of the Children Act. It stipulates that no child shall be ordered to imprisonment or to be placed in a detention camp. The sentence of 2 years imprisonment is incongruent with that provision of the law.
7. Alternative means of dealing with children in conflict with the law is contained in section 191 of the Children Act. In this matter however, the child-Appellant has served half of the sentence. Considering the above anomaly, I am of the view that the Appellant should be jailed for the period served.
8. The upshot is that the Appeal succeeds and the Appellant is forthwith set free unless otherwise lawfully held.

DATED AND SIGNED IN ELDORET THIS 25TH DAY OF NOVEMBER 2021.

E. K. OGOLA

JUDGE

DATED AND DELIVERED IN ELDORET THIS 25TH DAY OF NOVEMBER 2021.

R. NYAKUNDI

JUDGE