



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**CRIMINAL REVISION NO. 15 OF 2020**

**(From Original Conviction and sentence in Criminal Case No. 1630 of 2018 of the Principal Magistrate's Court at Gichugu –L. W. Kabaria(M/s -SRM)**

**MICHAEL MUNENE WANJIKU....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. This matter has been brought to my attention by the trial Magistrate, L. W. Kabaria, Senior Resident Magistrate for orders on revision. The background of the matter is that the subject MMW was charged with the offence of theft of Farm Produce Contrary to **Section 8(1) of Stock and Farm Produce Act (Cap 355 Laws of Kenya)**. After a full trial he was found guilty as charged.
2. The trial Magistrate committed the subject to a Borstal Institution for a period of Eight months and ordered a Probation Officer to confirm vacancy.
3. The Probation Officer has pointed out some errors which has given him challenges in executing the order.

These are:-

- a. **No Probation Officers report was requested before the subject was committed to the Borstal Institution.**
- b. **Under Section 5 of the Borstal Institutions Act, the committal period is strictly 3 years.**
- c. **The age assessment of the subject was not done before the committal order.**
- d. **Finally, a vacancy had not been confirmed.**

4. I have considered the issues raised. It is clear that the trial Magistrate did not comply with the express provisions of **Section 5 & 6 (1) of the Borstal Institutions Act Cap 92 Laws of Kenya**. The section provides:-

5. **Court before sentencing youthful offender to consider his history.**

**Before sentencing a youthful offender, a court shall consider the evidence available as to his character and previous conduct and the circumstances of the offence, and whether it is expedient for his reformation that he should undergo a period of training in a borstal institution.**

5. **Court before sentencing youthful offender to consider his history.**

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6. **Committal of youthful offender to borstal institution**

**(a) Where the High Court or a subordinate court of the first class or a juvenile court is satisfied, after considering the matters specified in section 5 of this Act, that it is expedient for his reformation that a youthful offender should undergo training in a borstal institution, it may, instead of dealing with the offender in any other way, direct that the offender be sent to a borstal institution for a period of three years.”**

The court has jurisdiction to issue orders on revision. Section 364 of the Criminal Procedure Code provides:-

**“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may -**

**a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;**

**b. in the case of any other order other than an order of acquittal, alter or reverse the order.**

**c. in proceedings under section 203 or 296 (2) of the Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and AntiMoney Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.**

**(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:**

**Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.**

**(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.**

**(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.**

**(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”**

The orders which this court may issue on revision are set out under Section 364 which include among others to alter or reverse the order.

5. In this case I find that the trial Magistrate ought to have asked for a pre-committal report, order age assessment of the subject and seek confirmation of a vacancy in one of the Borstal Institutions. She would then have proceeded to commit the subject to a Borstal Institution for a period of Three (3) years. I find that owing to the apparent errors made by the learned trial Magistrate, the committal order ought to be revised and set aside.

6. I have considered the record and I note that there is a presentence report which has only talked of challenges on executing the order. A presentence report should be filed and be considered by the trial Magistrate before she can give orders on how to deal with the subject.

7. I make the following orders:-

**1. The committal order by the trial Magistrate dated 3/1/20 committing the subject to a Borstal Institution is reviewed and set aside.**

**2. The file shall be returned to the trial Magistrate who should proceed as follows:**

**a. Call for Probation Officer’s report before committal.**

**b. Consider the report and if she is of the view that the subject should be committed to a Borstal Institution.**

**i. Order the Probation Officer to secure a vacancy for the subject in a Borstal Institution.**

**ii. Rely on the Age Assessment report by Lydia W. Muriuki already on record.**

**iii. Once the vacancy is confirmed, proceed as provided under Section 5 & 6 (1) of the Borstal Institutions Act (Cap 92 Laws of Kenya) quoted above.**

**3. The order be complied with expeditiously.**

8. Those are the orders of this court on Revision. The order be served on the Director of Public Prosecution and the Probation Officer.

**Dated at Kerugoya this 25<sup>th</sup> day of February 2020.**

**L. W. GITARI**

**JUDGE**