



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL REVISION NO. 8 OF 2017

BB.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Conviction and Sentence in Garissa Chief magistrate's Criminal Case No. 664 of 2017 J.J. Masiga SRM)

RULING

1. The Applicant BB was charged in the Magistrate's court at Garissa with house breaking contrary to Section 304 (1) and stealing contrary to section 2 (b) of the Penal Code. The particulars of the offence were that on 11th September, 2017 at about 12.00 hours at Madogo Trading Center, Tana - North sub-county, within Tana River County, jointly with another not before court, broke and entered the dwelling house of Ambia Ismail Mansa with intent to steal and did steal therein a T.V set make Wega valued at Kshs; 10,000/= and a mobile phone make Techno valued at Kshs; 6,500/= all valued at Kshs; 16, 500/= the property of Ambia Ismail Mansa.
2. He was brought before the magistrate's court on 18th September, 2017 and was recorded as having pleaded guilty to the charge. He was convicted and ordered to be held at Shimo la Tewa Borstal institution for a period of three (3) years as his age was assessed at Garissa County Referral hospital to be sixteen (16) years on 20th September, 2017, thus a child.
3. He has now come to this court through a request in writing for review of sentence filed on 6th November, 2017 under certificate of urgency.
4. In his above written request, he stated that the court failed to consider his mitigation, that he was hired by a bodaboda (motor-cycle) operator to carry goods which unknowingly turned to be stolen goods, and that he had been imprisoned with adults at Garissa Police Station as there was no Borstal Institution in Garissa. He thus asked this court to revise or review his conviction and sentence.
5. By at the time the matter came up in this court, the applicant had already been taken to Shimo la Tewa Borstal Institution. The matter was thus put off to 7th March, 2018, and on that day, the applicant stated that he wanted this court to reconsider his case.
6. Mr. Okemwa the learned Principal Prosecuting Counsel in response stated that this court had discretion under section 190 (1) and 191 of the Children Act 2001 to take into account the best interests of the child in determining the request of the applicant. In addition Article 53 of the Constitution was applicable.
7. I have considered the request of the applicant and submissions made before me. This court's revision powers in criminal matters are anchored under section 362 through to section 367 of the Criminal Procedure Code Cap 75. Under Section 365 of the Criminal Procedure Code, this Court can exercise its revision powers from the decision of sub-ordinate courts in criminal matters without hearing any interested party. However, I accorded a chance to the applicant and the State to address me.
8. The applicant request is for revision of the decision of the magistrate. He is 16 years of age and was ordered to be retained in a Borstal Institution for three (3) years. Such order is anchored in the law under the Children's Act Section 191 (1) (g) which provides as follows: -

191 (1) (g) " In the case of a child who has attained the age of 16 years dealing with him in accordance with any Act which provides for the establishment or regulation of borstal institutions. "
9. The order of the magistrate's court for committal of the applicant to a Borstal Institution is thus lawful.

10. I am aware that Article 53 of the Constitution provides that specific treatment to be accorded to children as a matter of right. The relevant part of the Article provides as follows:

53 (1) "Every child has a right:

(f) Not to be detained, except as a measure of last resort, and when detained, to be held.

(i) For the shortest appropriate period of time: and

(ii) Separate from adults, and in conditions that take into account of the child's sex and age.

(2) "A Child best interests are of paramount importance, in every matter concerning the child."

11. In the Criminal proceedings herein before the trial magistrate, the applicant said in mitigation that he was a first offender and asked for leniency. He did not give the circumstances of the offence or what he wanted, nor give a description of his station in life or what he did for a living, or whether or not he attended school. He has not given such description, even in the current application. He has not disclosed the name his father or mother or relatives who could care for him and their whereabouts.

12. In my view, it is thus not possible for this court to consider the circumstances that would favour the best interests of this applicant who is a child certainly above 16 years. He also seems to be challenging his conviction and in my view that is for the appellate court, not for this court sitting in its criminal review jurisdiction, which is an exercise of discretionary power.

13. The written law which I have cited above granted the trial court power to commit the applicant to a Borstal institution. Therefore, the order of the trial court was not patently illegal, and as such it cannot be for review by this court. The appropriateness of the duration he was ordered by the trial court to be in a Borstal institution should also be considered on appeal.

14. With the facts and circumstances availed to me in this request for review in the criminal matter, I am not able to exercise my discretion to make orders reviewing the orders of trial court. The applicant is however at liberty to appeal the decision of the trial court as he may wish as in my view, the fact that the request for review has not been successful, does not bar him from appealing against the decision of the trial court to the High court.

15. I thus decline the request for criminal revision of the orders of the magistrate's court herein. The applicant is however at liberty to file an appeal to the High Court for consideration.

Date, signed and delivered at Garissa this 14th day of **March, 2018**

George Dulu

JUDGE

In the Presence of:

Court Assistant: Martin/ Mohammed

State Counsel: Mr. Okemwa

Applicant: In person.

George Dulu

JUDGE