



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 2 OF 2018

M A A.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the Conviction and Sentence in Garissa CM, Criminal Case No. 633 of 2017 by Cosmas Maundu –CM)

JUDGMENT

1. The Appellant was charged in the Magistrate's court at Garissa with three (3) counts:

The first count was for burglary contrary to section 304 (2) and stealing contrary to section 179 (b) of the Penal Code.

The particulars of the offence were that on 21st May, 2017 at 03.30 hours at Hagadera Refugee Camp Fafi district within Garissa County entered the dwelling house of Adan Koran Borle with intent to steal therein and did steal one radio, one mobile phone, and cash Kshs; 10,000/= all valued at Kshs; 14,000/= property of Adan Koran Borle.

2. He was also charged with escape from lawful Police custody, on two occasions 26th May 2017 and 27th May, 2018.

3. He denied the offence of burglary and theft but admitted the two offences of escape from custody. He was convicted of the two counts and sentenced to pay a fine Kshs; 100,000/- on each of Count 2 and 3 or serve one (1) year imprisonment on each count, prison sentences to run consecutively.

4. With regard to charge of burglary and theft, he maintained denial of the charge. The matter was adjourned on a number of occasions, and on 16th January, 2018 the charge was withdrawn under Section 87 (a) of the Criminal Procedure Code, and the appellant was discharged.

5. He has now come to this court on appeal, on the ground that though he pleaded guilty to the two charges of escape from custody, the magistrate did not consider that he was a minor, and that the police harassed him. He stated that he was remorseful and that the sentence was excessive. He stated also that he was stressed due to the harassment he faced from other prisoners in custody.

6. Before the appeal was heard, this court ordered that a Probation and Children's Officers report be filed, and the same were filed.

7. At the hearing of the appeal, the appellant said that he wanted to be forgiven, because he wanted to attend school, as he was in Standard 8 when he was convicted and sentenced.

8. Mr. Okemwa the Principal Prosecuting Counsel, said that the appellant was a minor when he was convicted, and in line with Article 53 (1), (f) of the Constitution, he should not have been detained in custody except as a last resort. According to counsel also Section 190 and 191 of the Children Act was relevant.

9. Counsel however, pointed out that the appellant had tried to escape from prison custody twice and felt that there must have been collusion between him and prison officers.

10. I have perused the record of the trial court. The appellant was assessed to be 17 years of age, before he was sentenced. However, the learned magistrate does not appear to have taken this fact of age into account when sentencing him. He should have been treated as a child, which he was not. That was a mistake on the part of the trial court.

11. With regard to escape from lawful custody, it appears that the appellant had tried to escape from Police custody, not prison custody.

12. There might or might not have been collusion with the police or prison guards. However, the appellant's pleaded guilty to both offences of escape from custody.

13. I also have before me, favorable reports from the Probation Officer and the Children Officer. The appellant has already been in custody from September, 2017 which in my view is adequate punishment.

14. I will thus set aside the sentence and order that the appellant be given freedom but that his parents should care and guide him properly.

15. I thus set aside the sentence imposed and order that the prison term already served by the appellant is adequate punishment. He will thus be released from prison custody forthwith, unless otherwise lawfully held, and his parents should ensure that he maintains good conduct in society.

16. It is so ordered.

Dated, signed and delivered at Garissa this 18th day of April, 2018

George Dulu

JUDGE