REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO.47 OF 2017

D M M.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an Appeal from the Sentence in **Kitui Chief Magistrate's Court***

***Criminal Case No. 987 of 2017** by **J. M. Munguti P M** on **21/09/17**)*

J U D G M E N T

1. **D M M,** was charged with the offence of **Stealing Stock** contrary to **Section 278** of the **Penal Code.** Particulars of the offence were that on the **4th** day of **September, 2017** at about **9.30 p.m.** at **[particulars withheld] Village, Thua Location, Nzambani Sub-County** within **Kitui County,** stole one he goat, one she goat all valued at **Kshs. 11,000/=** the property of **Queen Ndunda.**

2. He was convicted on his own plea of guilty and sentenced to serve **seven (7) years imprisonment.**

3. Aggrieved by the sentence imposed he appealed on grounds that he was a minor at the time of commission of the offence and a student at **[particulars withheld] Secondary School.**

4. The State through learned State Counsel, **Mr. Mamba** opposed the Appeal. He urged that the sentence meted out was to deter the kind of behaviour exhibited by the Appellant and that there was nothing to prove that he was a student.

5. Pursuant to the order of the Court a social inquiry was carried out by the Probation Officer. The report dated the **27th** day of **September, 2018** has a Birth Certificate Serial No. **8099573** issued to **David Makau** son of **John Muema Ngiti.** The date of birth is indicated as **3rd August, 2002.** This was evidence that indeed the Appellant is aged sixteen (16) years old. There are also documents from **[particulars withheld] Secondary School** establishing the fact that he is a student.

6. A reconsideration of the record of the Lower Court shows that the Appellant was convicted and sentenced accordingly.

7. The **Children Act** defines a child as:

> ***""child" means any human being under the age of eighteen years;"***

The offender herein is a child.

8. **Section 189** of the **Children Act** provides thus:

> ***"The words "conviction" and "sentence" shall not be used in relation to a child dealt with by the Children's Court, and any reference in any written law to a person convicted, a conviction or a sentence shall, in the case of a child, be construed as including a reference to a person found guilty of an offence, a finding of guilt or an order upon such a finding, as the case may be."***

9. Principles upon which an Appellate Court will interfere with a sentence passed by the Lower Court were articulated in the case of **Ogolla s/o Owour vs. Republic (1954) EACA 270** where the Court of Appeal pronounced itself thus:

> ***"(i) The Court does not alter a sentence on the mere ground that if the member of the Court had been trying the Appellant, he might have passed a somewhat different sentence, and it would not ordinarily interfere with the discretion exercised by the trial Magistrate unless it is evident that the Magistrate acted upon some wrong principles or overlooked some material factors."***

10. This is a matter where the Court was in error. In the premises I quash the word conviction and set aside the sentence which I substitute with a reference thus:

The child in conflict with the law shall be under probation supervision for a period of **three (3) years**

11. It is so ordered.

Dated, Signed and Delivered at Kitui this 27th day of September, 2018.

L. N. MUTENDE

JUDGE