



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYAHURURU
CRIMINAL APPEAL NO.53 OF 2017
(Appeal Originating from Nyahururu CM's Court
Cr.No.53 of 2015 by: Hon. V.A. Ochanda – R.M.)
STANLEY WENDO MWAVI.....APPELLANT
- V E R S U S -
REPUBLIC.....RESPONDENT

J U D G M E N T

Stanley Wendo Mwavi was charged with three offences namely:

Count 1:

House breaking Contrary to Section 304(1) and stealing Contrary to Section 279(B) of the Penal Code

Particulars:

On 5th day of July, 2015 at Mugumo-ini Village within Laikipia County, broke and entered the dwelling house of **James Kigamba Njoro** with intent to steal cash Kshs.14,000/=, three shirts valued at Kshs.1,500/= and one short trouser valued at Kshs.300/=, all valued at Kshs.15,800/= the property of the said **James Kigamba Njoro**.

Alternative Charge:

Handling stolen property Contrary to Section 32(1)(2) of the Penal Code.

Particulars:

On 12th day of July, 2015 at Mugumo-ini Village within Laikipia County, otherwise than in the course of stealing, dishonestly retained three shirts, one short trouser knowing or having reason to believe them to be stolen goods.

Count II:

House breaking Contrary to Section 304(1) and stealing Contrary to Section 279(B) of the Penal Code

Particulars:

On 12th day of July, 2015 at Mugumo-ini Village within Laikipia County, broke and entered the dwelling house of **Simon Kagwi Kamau** with intent to steal from therein and did steal five blankets all valued at Kshs.3,500/= the property of the said **Simon Kagwi Kamau**.

Count III:

Being unlawfully in possession of identity card Contrary to Section 14(1)(f) of the National Registration Act Cap 107 Laws of Kenya.

Particulars:

On 12th day of July, 2015 at Mugumo-ini Village within Laikipia County, was found unlawfully possessing an identity card No.32211133, belonging to **Simon Maina Mureithi**.

He was arraigned before Hon. Ochanda Resident, Magistrate on 16/7/2015 and pleaded guilty to all the charges. He was convicted and sentenced as follows:

Count I:

3 years imprisonment on each limb

Count II:

3 years imprisonment on each limb

Count III:

Fine of Kshs.20,000/= in default 6 months imprisonment.

The court directed that the sentences in Counts I and II run concurrently but Count III was to run consecutively to Counts I & II.

The appellant has filed an appeal challenging sentence only. In his petition he contends that the court failed to take into account the fact that he was a minor, being less than 18 years old, that he is a first offender, that the sentence is too harsh and further that his mitigation was never considered. In his grounds, he seemed to be challenging the conviction too but changed at the hearing and stated that he only wanted a reduction of the sentence.

Mr. Mong'are, counsel for the State, did not oppose the appeal but left it to the court's discretion.

After the plea of guilty and conviction were entered against the appellant, the prosecutor said that the appellant had no previous records. The appellant was invited to give his mitigation but he remained silent. Having done so, there is no way the court would have known about his background, that he was an orphan, under the care of a grandmother and had siblings to fend for. The appellant's life has only been disclosed in the grounds of appeal.

In his grounds, the appellant claims to be 18 years old. This court sent him for age assessment and the Doctor has confirmed that his apparent age is 17 years according to his dental formula. He is still a minor. It means that when the appellant committed this offence in July, 2015, he was much younger, about 15 years old. He was therefore a minor and should have been treated as a minor and should not have been sent to prison.

Having pleaded guilty and a minor, the court should have considered sentencing the appellant under the Children's Act or given any other sentence provided under the law. At this stage, I must point out that the

trial court should not be hasty to send accused persons to prison especially where there may be a doubt as to the suspect's age. The court taking plea should be observant and ask the suspect questions if necessary because sentencing a minor to prison is a serious miscarriage of justice on a child, yet the court should be the first protector of a child's rights.

In the end, I do find that the sentence is illegal; it is hereby quashed and set aside. The appellant has already served about 2 years in prison. I will release him to be monitored and counseled by the Probation Office Nyahururu, for 6 months. Otherwise, he is set at liberty forthwith unless otherwise lawfully held.

Dated, Signed and Delivered at NYAHURURU this 29th day of June., 2017.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mutembei - Prosecution Counsel

Soi - Court Assistant

Appellant - present