



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL 130 OF 2015**

**B I I.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence of Hon. B. Khaemba, (Senior Resident Magistrate) in Chief Magistrate's Court at Kibera, Criminal Case No. 1649 of 2015 delivered on 4<sup>th</sup> May, 2015.)*

**JUDGMENT**

The Appellant herein was charged with the offence of stealing a motor vehicle contrary to Section 278A of the Penal Code. The particulars of the offence were that on 22<sup>nd</sup> April, 2015, at Agriculture, Fisheries and Food Authority Fiber Crops Directorate Company (Cotton Development Authority) along Riverside Drive in Kileleshwa within Nairobi County stole a motor vehicle Reg. No. KBJ 551U make Toyota Corolla model ZRE 152 valued at Kshs.1,000,000.00 the property of Agriculture, Fisheries and Food Authority Fiber Crops Directorate Company (Cotton Development Authority).

The Appellant was convicted on his own plea of guilty and was sentenced to serve five years imprisonment.

In a Memorandum of Appeal signed on 11<sup>th</sup> February, 2016 he appealed both against the conviction and sentence indicating that the sentence was harsh in the circumstance having pleaded guilty and did not waste the court's time through a lengthy trial, that he was born of a single mother who was physically paralyzed, that he suffered from diabetes and blood pressure due to the bad conditions in prisons and that for the period he had served in prison, he had reformed and learnt some skills which will help him earn a living. He urged the court to reduce his sentence and prefer a non-custodial sentence. He also appealed on the ground that as at the time of his conviction he had not yet turned 18 years. He submitted that he turned eighteen (18) years on 25<sup>th</sup> September, 2015. As at that time, he had just dropped from Form Three due to lack of school fees. Learned state counsel Ms. Nyaicho opposed the appeal. She submitted that the sentence imposed was reasonable since under Section 278A of the Penal Code, the Appellant was liable to imprisonment for a term of seven years. In any case, the offence was serious given that the value of the stolen motor vehicle was Kshs. 1,000,000.00. She emphasized that the appeal could not stand since the plea was unequivocal. She however did not respond in regard to the Appellant's age.

I have accordingly considered the respective submissions. It is clear from the record of proceedings that the Appellant was convicted on his own plea of guilty and that the plea was unequivocal. Respectively, under Section 348 of the Criminal Procedure Code, the Appellant could be entitled to appeal only as to the extent or legality of the sentence. However, he raised a pertinent issue which was neither raised at the trial nor addressed by the counsel for the Respondent. It may therefore be difficult for this court at this stage of writing the judgment to purport to address it. On the part of the court, an accused is entitled to a fair trial under Article 50 of the Constitution. This would entail not only during the actual hearing but also for the court to ensure that the proper sentence is imposed on an accused person. This principle cannot be met if custodial sentence is imposed on an under-age accused person.

Given that the issue of age of the Appellant was raised too late in the day, if this court were to proceed and dismiss it on the account that the plea was unequivocal, there would be the likelihood of occasioning injustice to the Appellant. For justice to be seen to be done and for purposes of correcting the apparent error that may have arisen at the trial, the most prudent thing to do is to order a retrial.

In the circumstance, I quash the conviction and set aside the sentence. I order that a retrial be conducted. The Appellant shall be escorted to Kileleshwa Police Station by latest 29<sup>th</sup> February, 2016 for purposes of processing him to take plea afresh within the stipulated time under the Constitution.

**DATED and DELIVERED this 25<sup>th</sup> day of February, 2016.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

In **the presence of:**

1. *Appellant in person.*
2. *M/s. Akunja holding brief for M/s Nyaundo for the Respondent.*