



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI

RESPONDENT

CRIMINAL REVISION CASE NO. 8 OF 2016

M M.....APPLICANT

VERSUS

REPUBLIC

REVISION

1. This matter has been placed before me following a letter written by **John Aringo, Resident Magistrate, Kyuso Law Courts** dated **5th October, 2016**. In the letter, the learned Magistrate states that he convicted and sentenced a child, an order that offends the provisions of the **Children Act**.
2. In the matter, **M M (MM)** a child was jointly charged with his father (**Matiti Maluki**) with the offence of **Stealing Stock** contrary to **Section 278** of the **Penal Code**. Particulars of the offence being that on the **23rd day of November, 2015** at **Maru Village, Kamuthanga Sub-location** in **Tseikuru Sub-county** within **Kitui County**, they jointly stole a she goat valued at **Kshs. 4,000/=** the property of **Gideon Ngui Kiteme**. He denied the charge, was tried, convicted and sentenced to pay a fine of **Kshs. 3,000/=** or serve imprisonment for duration of **one (1) month**.
3. The case as presented by the Prosecution was that PW1, **Gideon Ngui**, the Complainant lost his goat in **February, 2015** but did not make any report to the police. On the **23rd November, 2015**, PW2 **Mulyungi Nzili** had a goat at his home. The father to the child (**MM**) and his co-Accused learnt of the presence of the goat. Having lost his goat previously he went and claimed ownership. Subsequently he sent the child to collect the goat. Thereafter the Complainant learnt of what transpired and complained to the police. The two (2) Accuseds were arrested and charged.
4. In his defence, the father of the child claimed ownership of the goat. By then the goat had been disposed off. The trial court did not have the benefit of either seeing the goat or the mark that was alleged to have been on it. He faulted the father of the child to have failed to produce the receipt as proof of sale that may have taken place. He went on to convict both of them and sentenced them.
5. My duty as a court is to examine the proceedings before the subordinate court and satisfy myself of the correctness, legality of the findings, sentence recorded or passed by the court pursuant to the provisions of **Section 362 and 364** of the **Criminal Procedure Code**.
6. Considering the legality and propriety of the finding of the learned Magistrate, no evidence was adduced to prove the charge of **Stealing Stock**.

Stealing is defined by **Section 268** of the **Penal Code** thus:

“(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say—

(a) an intent permanently to deprive the general or special owner of the thing of it;

(b) an intent to use the thing as a pledge or security;

(c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

(e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner;

and “special owner” includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

(3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.

(4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.

(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.”

Section 278 is in respect of the penalty to be imposed which provides thus:

“If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, wether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.”

7. No evidence was adduced to prove ownership of the goat beyond any reasonable doubt. Without proof of what was allegedly stolen it was unsafe for the trial Magistrate to convict on mere suspicion.

In **Sawe vs. Republic (2003) KLR 364** the court held that:

“Suspicion however strong cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

8. Looking at the charge sheet, it is indicated the Accused was a child. Having been a child in conflict with the law, had the case been proved against him beyond any reasonable doubt, the words **“Conviction and Sentence”** were not supposed to be used. (**See Section 189 of the Children Act**).

The trial court was obligated to make a finding of guilt and proceed to deal with the child under **Section 191(1)** of the **Act** which provides thus:

"(1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways -

(a) by discharging the offender under section 35 (1) of the Penal Code;

(b) by discharging the offender on his entering into a recognisance, with or without sureties;

(c) by making a probation order against the offender under the provisions of the Probation of Offenders Act;

(d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;

(e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;

(f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;

(g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;

(h) by placing the offender under the care of a qualified counsellor;

(i) by ordering him to be placed in an educational institution or a vocational training programme;

(j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act;

(k) by making a community service order; or

(l) in any other lawful manner."

9. In the instant case, the trial Magistrate erred. The error occasioned an injustice. In the premises, I quash the conviction and set aside the sentence imposed. The child shall be released forthwith unless otherwise lawfully held.

10. It is so ordered.

Dated, Signed and Delivered at Kitui this 11th day of October, 2016.

L. N. MUTENDE

JUDGE