REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO.171 OF 2013

CLEOPHAS MWALUKO ALOIS.....APPELLANT

VERSUS

REPUBLIC….....RESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's

Court, Criminal Case No. 805/2013 by Hon. P.N. Gesora, SPM on 22/7/2013)

JUDGMENT

1. Cleophas Mwaluko Alois, the appellant was jointly charged with another with four counts of stealing contrary to **Section 275** of the **Penal Code** and three (3) alternative counts of handling stolen property contrary to **Section 322 (2)** of the **Penal Code.** Particulars of the charges were as follows:-

Count 1 - on the 10th day of July, 2013 at **Uuni** sub-location, **Vyulya** Location in **Mwala** District within **Machakos** County jointly with another not before court stole one mobile phone, make Tecno valued at Kshs. 2,700/= the property of **Anastasia Mwikali Aloise.**

2. Count 2 – On the 13th day of July, 2013 at **Uuni** sub location, **Vyulya** Location in **Mwala** District within **Machakos** County **Cleophas Mwaluko Aloise** and **Pius Ndonye Muthike** jointly stole one mobile phone make Q7 valued at Kshs. 3,000/= the property of **Mary Nduku alois.**

Alternative charge to **count 2-** On the 13th day of July, 2013 at **Uuni** sub location, **Vyulya** Location in **Mwala** District within **Machakos** County otherwise than in the course of stealing **Cleophas Mwaluko Lois** and **Pius Ndonye Muthike** jointly dishonestly received and retained one mobile phone make Q7 knowing and having reason to believe it to be stolen property or unlawfully obtained.

3. Count 3 – On the 15th day of July, 2013 at **Uuni** sub location, **Vyulya** Location in **Mwala** District within Machakos County **Cleophas Mwaluko Alois** jointly with another not before court stole one NS 70 Chloride Exide Battery valued at Kshs. 5200/= the property of **Anastacia Mwikali Aloise**

Alternative charge to **count 3 -** On the 20th day of July, 2013 at **Uuni** sub location, **Vyulya** Location in **Mwala** District within **Machakos** County otherwise than in the course of stealing **Cleophas Mwaluko Alois** jointly with another not before court dishonestly received and retained one NS 70 Chloride Exide battery knowing and having reason to believe it to be stolen property or unlawfully obtained.

4. Count 4 - On the 16th day of July, 2013 at **Uuni** sub location, **Vyulya** Location in **Mwala District** within **Machakos** County **Cleophas Mwaluko Aloise** stole one mobile phone make Samsung valued at Kshs. 2000/= the property of **Anastacia Mwikali Aloise.**

Alternative charge to **count 4 -** On the 20th day of July, 2013 at **Vyulya** Market in **Mwala** District within Machakos County **Cleophas Mwaluko Alois** otherwise than in the course of stealing dishonestly retained one mobile phone make Samsung knowing or having reason to believe it to be stolen property or unlawfully obtained.

5. The appellant pleaded guilty to each and every count. Accordingly he was convicted and sentenced to serve one (1) year imprisonment on each count. Further, the magistrate ordered each sentence to run consecutively.

6. Being dissatisfied with the court's decision, the appellant appealed on the grounds that the trial magistrate erred in law and fact:-

i. By convicting in the absence of an age assessment report;

ii. By convicting on an equivocal plea of guilt;

iii. By disregarding the recommendation of the Probation Officer in imposing sentence;

iv. By convicting the appellant on a defective charge;

7. The appeal was canvassed by way of written submissions.

8. It is submitted that the trial Court convicted and sentenced the appellant without ascertaining his age. The state through, **Ms Kefa** State Counsel argued that the appellant's age was assessed and found to be 18 years. This is a case where one of the complainants was the appellant's mother. It is on record that in his mitigation the appellant stated that he was eighteen (18) years old. A social inquiry was carried out by the Probation Officer which established the age of the appellant. It has been held that the age of a person can be proved by a parent. This ground of appeal fails.

9. As correctly stated, the proper procedure of taking plea was stated in the case of ***Adan –versus- Republic [1973] E.A.* 445-** where the Court of Appeal stated thus:-

i. The charge and all the essential ingredients of the offence should be explained to the accused in a language that he understands;

ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

iii. The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

iv. If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and a change of plea entered.

v. If there is no change of plea, a conviction must be recorded and a statement of the facts relevant to the sentence together with the accused's reply must be recorded and a change of plea entered.

vi. If there is no change of plea, a conviction must be recorded and statement of the facts relevant to the sentence together with the accused's reply must be recorded.

10. It is argued that the court did not record the exact words used by the appellant to answer the charge. It is recorded he answered:-

"***Guilty"***

The accused's own words may or may not have been recorded. But, following the admission, facts of the case were stated and the appellant admitted the same. Facts presented disclosed offences as charged. The appellant was subsequently convicted. The appellant having admitted facts presented, the omission if any was not prejudicial to the appellant, therefore could not have made the plea equivocal. Similarly, failure to cite the section that created the offence in addition to the penal section was not detrimental to the prosecution's case since the offence the appellant was charged with was communicated to him. A recovery was made and the appellant made an admission of the same.

11. The plea having been unequivocal the appellant could only appeal against the legality of sentence. (see **Section 348** of the **Criminal Procedure Code)**.

12. A report was filed by the Probation Officer which recommended a non-custodial sentence. In his remarks the trial magistrate stated thus:-

> "***The facts herein clearly indicate that the accused persons have repeated acts of theft and impunity and I hold that a non-custodial sentence is not appropriate".***

13. The recommendation by the Probation Officer was based on the fact that the appellant was a form three student at Katheka Secondary School. His mother, the complainant was willing to assist him during the rehabilitation process. Although it was stated that the appellant had become a bother, being a first offender in law, the trial magistrate should have taken into consideration the objective of sentencing. This was a young offender who did not have to be punished by being incarcerated. A non-custodial sentence as recommended should have been considered for purposes of rehabilitation and to enable the appellant continue with his studies.

14. It was also erroneous on the part of the magistrate to order sentences to run consecutively. In the case of ***Elias Abdi Osman versus Republic [2006] eKLR*** the court stated thus:-

> ***"It has been repeatedly said that where a person commits more than one offence at the same time and in the same transaction, concurrent sentences of imprisonment should be imposed…"***

15. Consequently, I hereby quash the sentence meted out and substitute it accordingly. The offender will be under Probation Supervision for a period of three (3) years. He will be required to report to **Machakos Probation Officer** to commence serving the sentence today the 17th **March, 2015.**

16. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **17TH** day of **MARCH, 2015.**

L.N. MUTENDE

JUDGE