REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCRA. NO. 12 OF 2008

R.K.H……..……...… APPELLANT

VERSUS

REPUBLIC…….…….RESPONDENT.

LESIIT J.

(From the original conviction and sentence in Criminal Case No. 187 of 2007 of the Senior Resident Magistrate court

at Moyale Hon Mr. J. N. Nduna.)

J U D G E M E N T

The appellant was convicted of one count of stealing stock contrary to section 278 of the Penal code. He was sentenced to 7 years imprisonment as of 30th July 2007. He was aggrieved by the sentence and therefore filed this appeal.

The appellant raised five grounds of appeal. In brief the grounds were that the sentence of seven years imprisonment was harsh and excessive by reason that he was 15 years of age when he committed the offence. The other ground is that the appellant was remorseful and repentant for the offence.

The appellant in his brief submissions urged the court to reconsider the sentence of seven years saying he was 17 years of age. He submitted that the sentence should be reduced for the reasons that it was excessive.

Mr. Kimathi learned counsel in his brief submissions urged that the appellant was a minor at the time of sentence, and ought to have been dealt with under section 191 of the Children's Act. Mr. Kimathi urged that there are twelve punishments under that section and that imprisonment is not one of them. In the circumstances he urged the court to place him on probation for his rehabilitation.

I have considered this appeal the offence was alleged to have been committed on 4th June 2007. He was convicted for the offence and sentenced to serve seven years imprisonment. On 30th July, 2007.When the appellant first appeared before this court. Age assessment was ordered to be done. The doctor's report was duly filed. It is dated 25th June 2008. The doctor approximated the age of the appellant as below 18 years old. This means that at the time of the arraignment in court and also at the time of sentencing the appellant was below 18 years of age.
I agree with Mr. Kimathi that the learned trial magistrate ought to have complied with section 191 of the Children's Act before passing any sentence. This section provides the methods of dealing with children offenders. It provides as follows:

"191 (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 Consideration of welfare. Friendly setting of children's court. Words "conviction" and "sentence" not to be used of child. Restriction on punishment. Methods of dealing with offenders. Cap. 63. Cap. 64. CAP. 141 *Children* 1 0 6 [Rev. 2009 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. (2) No child offender shall be subjected to corporal punishment".

The learned trial magistrate ought to have dealt with the appellant in any one of those twelve options provided under this section. Having failed to do so, the learned trial magistrate acted utla vires the law. It also means that not only was he extremely harsh but has deprived the appellant of liberty from the date he was sentenced in this case in 2007 to date. It also means that the appellant has served a substantial part of his sentence.

Having considered all these circumstances, I find that the appellant has suffered sufficiently and that no other sentencing options should be considered to be imposed against him.

I set aside the sentence of the seven years imprisonment and order for the immediate release of the appellant from custody unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD OF MARCH, 2011

J. LESIIT

JUDGE.