



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HCCRA NO. 10 OF 2010

CONSOLIDATED WITH HCCRA NO. 11 OF 2010

(From: Original Criminal Case No. 360 of 2009 MOYALE; CHARLES OBULUTSA PM)

LESIIT, J.

ABDUB GUYA DABARRA.....1ST APPELLANT
SHAMA MACHA DUBA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The two appellants were arraigned before the Moyale SRM's Court with one count of Stealing Stock contrary to section 278 of the Penal Code. They were accused of stealing four cows valued at Ksh.34,000 the property of Elema Sora Yara on the 14th October 2009 at Elbok village, Sololo District. The appellants pleaded guilty to the charge and were sentenced to 7 years imprisonment.

Both the appellants filed their separate appeals. I have consolidated the two appeals having arisen out of the same trial. The appellants filed petitions of appeal raising the same grounds of appeal. The first ground challenges the sentence of imprisonment, that the learned trial magistrate erred in failing to inquire into the appellants age, that the appellants were below 18 years of age and the Children Act forbade imprisonment of children. The second ground challenges the learned trial magistrate for failing to consider the appellants mitigation in which they sought leniency.

In court the 1st appellant urged the court to consider that he was 20 years old as at the time he urged his appeal that he still admitted the charge. He urged the court to reconsider his sentence on account of his age.

The 2nd appellant stated that he was 20 years old, and that he was remorseful for the offence and would not repeat it. He urged the court to consider his appeal against sentence.

Mr. Kimathi represented the State in this appeal. Counsel did not oppose the appeal against sentence on grounds appellants admitted the charge, that the stolen cattle was recovered and that by pleading guilty to the charge the appellants saved court's time.

I have considered the appellants appeals which are basically against sentence.

The charge against them was Stock Theft contrary to section 278 of the Penal Code. The appellants have told the court that they are 20 years old. At the trial before the lower court they made no mention of their age. However, where age is not known section 2 of the Children Act defines "age" as

"Age where actual age is not known means apparent age."

Where an accused person does not raise the issue of age, it is the duty of the court to satisfy itself of the age of the persons charged before them. That duty exists especially when considering the nature of the sentence suitable not only in regard to the offence charged but also in relation to the age of the offender. S.190 of Children Act gives restrictions on punishment. S.191 of the same Act provides methods of dealing with child offenders. These sections provide:-

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 recognizance, 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

(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.

Back to the matter before me, the appellants ages are unknown. However when I first saw them on 5th May 2011, it was quite apparent that they were young persons. My estimation was that they may have been below 19 years. When I inquired from them, they said they were 20 years of age. Considering the appellants were arraigned in court on 19th October 2009, one, year, and eight months ago, they must have looked much younger. The learned trial magistrate failed in his duty when he omitted to inquire into the age of the two appellants.

The offence for which the appellants were convicted calls for a sentence of imprisonment for a term not exceeding 14 years. There is no minimum sentence provided under s.278 of the Penal Code.

I have reconsidered the circumstances of the case. The appellants are young persons. This was a first conviction. The animals which they had stolen were all recovered and therefore no loss was occasioned to the complainant. I find period already served by the appellants more than sufficient punishment in all the circumstances of this case. I will allow the appellants appeal against sentence by setting aside the sentence of 7 years imprisonment. In substitution thereof, I reduce the sentence to the period already served.

Dated, signed and delivered this 26th May 2011

Lesiit J

Judge