

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL NO. 250 OF 2010

B.A.A..... APPELLANT

V E R S U S

REPUBLIC RESPONDENT

J U D G M E N T

The appellant was charged with the offence of wilful and knowingly causing a child to be in need of care and protection contrary to section 127(1)(b) of the Children Act. The particulars of the offence were that on 13th October 2010 at M[...] Township in Vihiga District, the appellant wilfully and knowingly caused O.A.K., a school pupil aged 14 years to be a child in need of care and protection by luring her out of school for child labour. The appellant pleaded guilty to the charge. She was sentenced to serve three (3) years imprisonment. The appellant was aggrieved by the sentence that was imposed on her and duly appealed to this court.

In her petition of appeal the appellant raised several grounds of appeal basically challenging the severity of the sentence imposed on her. She was aggrieved that she had been sentenced to serve a custodial sentence that was manifestly excessive and harsh. She was aggrieved that the trial court did not take into account the entire circumstances of the case before she sentenced the appellant to serve a custodial sentence. She faulted the trial magistrate for not taking into account her mitigation before sentencing her to serve a custodial sentence. During the hearing of the appeal, the appellant essentially reiterated the contents of her grounds of appeal. The State left the issue of sentence to the court.

This court has considered the appellant's plea on sentence. Section 127(1)(b) of the Children Act provides that if a person is convicted of a charge under the section, the person is required to be fined a sum not exceeding KShs.200,000/= or to a term of imprisonment not exceeding five (5) years or both. From the proceedings it was clear that the appellant was a first offender. The trial court did not take into account this factor. If it did, it should have in the first instance fined the appellant and not sentenced her to serve a custodial sentence. Unless the special circumstances of the case justifies, the custodial sentence imposed on the appellant was harsh. In this court's considered view there were no special circumstances which could have made the trial court sentence the appellant to serve a custodial sentence when she was a first offender.

In the premises therefore, this court will allow the appellant's appeal. The appellant was sentenced to serve the custodial sentence on 2nd November 2010. The appellant has been sufficiently punished. In the period that she has been in prison, she must have reflected on her conduct and taken note of where she went wrong. Her sentence is commuted to the period already served. She is set at liberty unless otherwise lawfully held. It is so ordered.

DATED AT KAKAMEGA THIS 19TH DAY OF MAY 2011

**L. KIMARU
J U D G E**