



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRA NO. 55 OF 2011

LESIIT, J

REPUBLIC.....RESPONDENT

VERSUS

G.K.J.....APPELLANT

(From the original conviction and sentence in Maua SPM'S No.903 of 2011-J.M.KINGORI)

JUDGEMENT

The appellant G.K.J. was charged with one count of stealing contrary to Section 275 of the Penal Code. He pleaded guilty to stealing miraa with 1000/=. The court called for a pre-sentence Probation Officers Report before sentencing the appellant to 18 months imprisonment.

When the appellant came for his appeal, this court noted that he was youthful and of an appellant age way below 18 years. When asked, he said he was 18 years old. On that ground the learned state counsel, Mr.Kimathi, conceded the appeal and stated that the sentence was illegal by virtue of the appellant's age. He however asked court to note that the Probation Officer's Report was to the effect the report was unfavourable to the appellant as he was found to be a habitual thief.

The counsel for the appellant left it to court in view of the sentiments by the state counsel.

I will start with the Probation Officer's Report. The one on the file, curiously in handwritten form, is favourable to the appellant and recommends a community service order sentence. I will confirm the Report from the officer when he comes to court.

From the appeal itself the appellant pleaded guilty. The total value of the "miraa" stolen, as recovered from him, was assessed at Kshs. 1000/=.

The appellant is a youthful offender. The prosecution had no adverse records on him. As I have stated in earlier occasions, the previous criminal record of an accused person can only be produced by the prosecution. They are the ones charged with the duty of keeping past criminal convictions of an accused person. The docket to match finger prints and keep the data is with the Office of the President under which the Police force falls.

The Probation Department have no mandate to comment on the criminal record of an accused person. All they can indicate is the known reputation of the offender within the domain of persons they have intervened, or past experience with the offender. The source of such information must also be disclosed.

A trial court should not confuse a Probation Officer's comment on an offender's character, reputation and

antecedents to be a previous criminal record of the accused. Such a criminal record should be produced by the prosecution under signature and certificate from the central Records Bureau held by the CID or other Police Department.

Turning to the matter before court S2 of the children Act, the interpretation Section of the act defines “age” as;-

“Where actual age is not known means apparent age”

Under the same section;

“Child means any human being under the age of eighteen years”

The appellant’s apparent age is 17 years of age. I note that the probation report gives his age as 20 years. Whether he is 17 years or 20 years it does not make much difference in the court’s eye. He is a youthful offender. He pleaded guilty to the charge thus saving courts time. He is first offender. The value of what was stolen, and what was found in his possession and executed in court was Kshs. 1000/=. Surely the sentence of 18 month’s imprisonment is harsh and uncalled for in all the circumstances of the case.

I accordingly set aside the sentence of 18 months imprisonment. The court will determine the sentence to pass in this matter after hearing he counsel for the appellant and the Probation Officer.

Dated this 28th day of July 2011.

**LESIIT, J
JUDGE**