



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Criminal Appeal 125 of 2008

(From original conviction and in Criminal Case No. 1336 of 2008 sentence of the Chief Magistrate's Court at Malindi before Hon. J. Kituku – RM)

OMAR GOGANEAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

Omar Gogane (the appellant) was convicted on a charge of store breaking and stealing contrary to section 306 (a) of the Penal Code. He pleaded guilty to the charge whose particulars were that on the night of 13th and 14th September 2008 at Kiketa Primary School, Omitho Village, Kau sub-location, Kilentegweni location in Tana Delta District jointly with others not before court, broke and entered into a building namely a store, with intent to steal and did steal from therein one hundred and seventy five kilograms of rice, four kilogram's of cooking fat and a football case all valued at Kshs. 33,600/- the property of Riketa Primary School.

The charge was read over to the appellant in Kiswahili and appellant's response was:-

“it is true”

The facts narrated were that on the night of 13th and 14th September 2008 at 2.00am at Riketa school the watchman Kazungu Charo was on duty when a group armed with crude weapons entered the school and store 117kgs of rice, 14 kgs of cooking fat and a football case valued at kshs. 33,600/-. The matter was reported at Kipini Police Station, and investigations commenced. On the same night of 14th and 15th September 2008, the school management received some information and laid an ambush – they saw four suspects, among them being the appellant, pushing a bicycle loaded with rice. They confronted the suspects who ran in different directions. A chase resulted in the arrest of two, one of them being the appellant. Appellant confirmed the facts as true and in mitigation pleaded that he had small children. The prosecutor informed the trial court that appellant was a first offender.

The trial court considered the mitigation and noted that the offence was serious and touched on a public institution and the livelihood of school children. He was then sentenced to serve 4 years imprisonment.

The appellant challenged both conviction and sentence on grounds that:

- 1) He pleaded guilty to the charge after police made promises to him that he would be sentenced to a few months imprisonment or be fined as that was a minor offence.
- 2) The trial magistrate erred in failing to bear in mind that the source of arrest was not related to the offence but was as a result of an existing grudge.
- 3) That nothing was found in his possession.
- 4) Police did not investigate the matter thoroughly
- 5) He was totally innocent

Appellant filed written submissions which were replicate of his memorandum/grounds of appeal.

The appeal was opposed, and counsel for the Sate Mr. Naulikha pointed to that appellant pleaded guilty to the offence and cannot now claim that he did so because of promises made to him – that he should have raised such an issue in the trial court- I agree. Mr. Naulikha submitted that there was nothing to persuade this court to interfere with the sentence.

An evaluation of the trial court's record shows that the plea was unequivocal – there is nothing whatsoever to suggest coercion or otherwise. Appellant never disputed the facts or say that there was an existing grudge between him and persons from the school.

My finding is that the plea was properly taken and conviction was safe and I uphold it.

The offence attracts an imprisonment term of seven years. The items stolen were food from an institution catering for children – the total value being kshs. 33600/-. There was no expression of remorse on the appellant's part, he only lamented about his young children. Taking into account the circumstances and the nature of the offence, I consider the sentence not only to be legal but appropriate. I therefore find no reason whatsoever to interfere wit the sentence and I confirm it.

The upshot is that there is no merit in the appeal and the same is dismissed.

Delivered and dated this 17th day of **February 2010** at Malindi.

H. A. Omondi

JUDGE