

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
Criminal Appeal 104 of 2004

**(From original conviction and sentence of the Senior Resident
Magistrate's Court at Sotik in Criminal Case No. 2241 of 2004 –
Mr Mugambi SRM**

CKL (a minor) APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant, CKL, was charged with two offences under the **Penal Code**. He was charged with assault causing actual bodily harm contrary to **Section 251**. The particulars of the offence were that on the 30th of July, 2004 at Mogonchok village, Bureti District, the appellant assaulted Christine Langat Cheronu causing her actual bodily harm. He was further charged with arson contrary to **Section 332(a)**. The particulars of the charge were that on the same day and at the same place, the appellant wilfully and unlawfully set fire to a building used as a dwelling house by the said Christine Cheronu. When the appellant was arraigned before the trial magistrate's court, he pleaded guilty to both counts. He was sentenced to serve eighteen months and three years imprisonment respectively for the two offences. The sentences were ordered to run concurrently. The appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

The appellant's petition of appeal contains basically two grounds of appeal. The first ground is that he was tricked by his step-brothers into pleading guilty to the charges as he was made to believe that he would be forgiven. In essence, the appellant was appealing to this court to the effect that the plea of guilty which was recorded by the trial magistrate was equivocal. The second ground of appeal was on sentence. The appellant complains that the custodial sentence meted out on him was too harsh and excessive considering the fact that he was seventeen years at the time he was tried. At the hearing of the appeal, the appellant presented to this court written submission in support of his appeal. He also made oral submissions. He admitted the two offences but pleaded with this court to re-consider the issue of sentence with a view of reducing it. Mr. Koech, Learned State Counsel did not have anything to say on the issue of sentence.

Having carefully re-evaluated the proceedings before the trial magistrate, I do hold that the plea of guilty as recorded by the trial magistrate was unequivocal. The said plea of guilty was recorded in accordance with the law. The two charges were read to the appellant in a language which he understood and the explanation of the two charges made to him. The appellant made an informed decision to plead guilty to the charges. The issue as regards whether he was tricked into pleading guilty to the charges is therefore neither here nor there. The facts of the case were read to the appellant. He knew the consequences of admitting to the said offences. At the hearing of this appeal, the appellant abandoned his appeal on conviction, and in my view, rightly so. He however craved for the leniency of this court on the issue of sentence.

The issue that concerned this court, is that the trial magistrate sentenced the appellant before first establishing his age. The appellant has submitted that he was seventeen years at the time he committed the offence. Being a seventeen year old, the appellant was a child within the meaning of **Section 2** of the **Children Act**. Under **Section 191** of the **Children Act**, a child who is found guilty of an offence cannot be sentenced to serve a custodial sentence. The assertion that the appellant was seventeen years at the time of his conviction has not been seriously challenged by the State.

In the circumstances therefore, I do hold that the custodial sentence imposed on the appellant was illegal. The appeal filed by the appellant on sentence therefore succeeds. The custodial sentence imposed is therefore set aside. Since the appellant has served twenty one months of the said illegal sentence, he is ordered set at liberty and released from prison forthwith unless otherwise lawfully held.

DATED at KERICHO this 30th day of September 2005.

L. KIMARU

JUDGE