



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 323 OF 2002**

(Being an appeal against Sentence in Criminal Case No. 1174 of 2001 by the  
Resident Magistrate's Court – A. Ngugi)

**GEORGE MBUGUA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**J U D G E M E N T**

The Appellant was charged and convicted for the offence of Child Stealing Contrary to Section 174(1)(b) of the Penal Code and Sentenced to served 4 years imprisonment. He has preferred an appeal against Sentence only on the grounds that the prison conditions were too harsh and as a result his health was deteriorating. He also said he was now remorseful. The State Counsel supported the Conviction but pointed out that the error by the prosecution to have charged the appellant with the offence under Section 174(1)(b) instead of Section 174(1)(a) of the Penal Code was curable and not fatal or prejudicial to the appellant as the evidence adduced supported the charge under Section 174(1)(a). She also supported the Sentence of 4 years.

The evidence on record is that PW1, Mutuku Kamatu had on the 28.3.01 at around 6.00 p.m. taken his son to a Restaurant at Likoni known as "The office." While he sat and talked with friends, the child aged 3 years and 8 months was playing not far away when a man he identified as the appellant joined the child and continued to play with him. After a while he saw them go towards the Disco hall and when he followed he found the appellant in conversation with his son and he returned to join his friends as he did not suspect the appellant could be up to any mischief. However when he went to check on the child the second time both the appellant and child were missing and he was informed a man had been seen leave the Restaurant towards Shelly Beach with the child. A search was mounted and PW2, Donald Kengo who worked as a DJ at the Restaurant went searching towards Shelly Beach. He spotted the appellant in the Company of the child and a Third person walking towards the Beach. He noted the second person held a small knife but he ran away. PW2, overpowered the appellant with the help of his driver and they took him and the child back to the restaurant where PW1, identified him. He was then handed over to PC. Dominic Marena at Likoni Police Station where the incident was reported. The appellant was charged with Child Stealing Contrary to Section 174(1)(b). However the offence falls under Section 174(1)(a). The evidence adduced was clearly in support of a charge of stealing. I agree with the State Counsel that the error in quoting the wrong sub-section did not occasion any prejudice to the appellant and neither is it Fatal to the case. It is an error that can be cured under the Provisions of Section 382 of the Criminal Procedure Code.

As for the Sentence, the appellant says the prison conditions are too harsh and his health is affected. This in my opinion are not reasons good enough to warrant my interference with otherwise what I consider a proper Sentence. It is not excessive in the light of the nature of the offence. The Appellant took advantage of the child's innocence and winning his trust, lead him away from his parent. The fact that the prison is not as comfortable as the appellant would wish, is unfortunate but the prison is meant to be an institution to current those who have broken the law like him and not a luxury holiday Hotel. In the Circumstance the appeal is dismissed in its entirety.

**Dated and Delivered at Mombasa this 18th day of July, 2003.**

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**