REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO.58 OF 2016

S O M ……………………….…..APPELLANT

VERSUS

REPUBLIC ……………………..RESPONDENT

(*Being an appeal from the whole judgement by* ***G. MUTISO SRM****, dated* ***29th July, 2016*** *in MAKINDU Criminal Case No. 693 of 2016)*

BETWEEN

REPUBLIC ………...COMPLAINANT

VERSUS

S O M ……………………..ACCUSED

JUDGMENT OF THE COURT

1. The Appellant S O M filed this appeal on the 11th August, 2016 and advanced five (5) grounds of appeal on the face of the Memorandum of Appeal as follows:-

> ***1. That the Learned Trial Magistrate erred both in law and facts when he failed to find and hold that there was no enough evidence to support the charge and to connect appellant with the offence beyond reasonable doubt.***
>
> ***2. That the Learned Trial Magistrate erred both in law and facts when he failed to consider the issue of whether the Appellant being a minor comprehended the fact that there were two charges against him and each is a separate count.***
>
> ***3. That the Learned Trial Magistrate erred in law and fact by failing to find and hold that the Appellant's constitutional rights.***
>
> ***4. That the learned Trial Magistrate failed to take into account the fact that the Appellant/Applicant at the time of the charge was a minor and did not fully comprehend the charges read to him.***

2. The appeal is an appeal from the decision of Hon G. M. Mutiso SRM in Makindu Criminal Case No.693 of 2016 which was filed in court on the 11th August, 2016. The Appellant was arraigned before the Principal Magistrate's court at Makindu to face two counts namely:-

1. Arson contrary to section 332(a) of the Penal code. The Particulars being that on the 29th May 2016 at [particulars withheld] Mixed Secondary School in Kibwezi sub-county within Makueni County willfully and unlawfully set fire to a dormitory valued at Kshs.3,000,000/= belonging to [particulars withheld] Mixed Secondary School.

2. Conspiracy to commit a felony contrary to section 393 of the Penal Code. The particulars are being that, on the 29th May, 2016 at [particulars withheld] Mixed Secondary School in Kibwezi sub- County within Makueni County conspired together with four others to commit a felony namely to set fire to a dormitory valued at Kshs.3,000,000/= the property of [particulars withheld] Mixed Secondary School.

3. The appellant while preparing to prosecute this appeal opted to file a Notice of Motion dated 17/01/2017 seeking for the following orders namely:-

1. THAT this application be certified as urgent and be heard ex-parte in the first instance.

2. THAT this Honourable court be pleased to grant an order suspending the execution of the sentence and subsequently order for the applicant to be released from Shimo la Tewa Borstal Institution on bail upon such terms and conditions as the court may deem fit and expedient to impose pending the hearing and determination of the application herein.

3. THAT this Honourable court be pleased to grant an order suspending the execution of the sentence and subsequently order for the Applicant to be released from Shimo la Tewa Borstal Institution on bail upon such terms and conditions as the court may deem fit and expedient to impose pending the hearing and determination of the appeal herein.

4. THAT the court be pleased to make such orders as the ends of justice may require.

The said Application is premised under section 357 of the Criminal Procedure Code and all other enabling provisions of the law. The Application is supported by an annexed Affidavit of the Appellant and the following grounds namely:-

1. The Appellant/Applicant was charged with the offence of attempting to commit arson contrary to section 333 of the Penal code and in the alternative the offence of arson contrary to Section of the Penal Code at the Makindu Principal Magistrate's court Criminal case No.693 of 2016.

2. The Appellant pleaded guilty to both charges.

3.The Appellant was subsequently convicted and sentence to serve a term of 3 years at the Shimo la Tewa Borstal Institution on the 29th July, 2016.

4. At the time of charge the Appellant/Applicant was a minor of 16 years.

5. That the appellant, being a minor failed to understand that there were two charges against him and as a result the Appellant failed to understand the proceedings of the court and consequences of a second charge against him.

6. In contravention to the provisions of the Constitution of Kenya 2010 the Appellant was denied a chance t a fair hearing as he did not understand fully the proceedings before the court.

7. The appellant/Applicant is aggrieved by the conviction and sentence and has preferred the appeal herein against the same.

8. The Appellant/Applicant has arguable grounds of appeal with good chances of success.

9. It is therefore in the interest of justice that the court does grant the orders sought pending hearing and determination of the appeal.

10. Failure to grant the said orders would amount to a great injustice against the Appellant/applicant as he would in effect have served an illegal sentence in the event the appeal succeeds.

11. It is only fair and in the interest of justice that this application be granted for the interest of justice.

12.The Appellant/Applicant undertakes to avail himself to court whenever required to do so without fail and to comply with such conditions as the court may deem fit and just to impose upon him.

13. The Appellant/Applicant resides within Makueni County with his mother and as such he is readily available to attend court whenever required to.

3. The Appellant/Applicant will suffer irreparable harm if the application is not allowed as he shall have served a substantial part of his sentence by the time his appeal is heard and determined and also he is a student in high school whose studies have already been extensively interrupted.

4. The Respondent through the learned Prosecution counsel Cliff O. Machogu field a replying affidavit sworn on the 7/02/2017 in which he conceded to both the appellants application and the Appeal due to the following reasons namely:-

i. THAT at the time of the charge the Appellant was a minor and thus under section 186(b) of the Children's Act provided that a child accused of any offence shall be provided with legal assistance by the Government if he is unable to obtain legal representation.

ii. THAT there was contravention of these provisions during trial since the Appellant was never accorded legal representation as provided for under the Children's Act.

iii. THAT the bail said lack of legal representation was an violation of the Appellants rights under Article 49 and 50 of the constitution of Kenya.

iv. THAT the proceedings that led to the conviction and sentence of the appellant were defective for want of legal representation in accordance with section 77 and 186 (b) of the children's Act and hence the appellant has been serving an illegal sentence.

5. A perusal of the record of the lower court at Makindu Law courts shows that the Appellant is named as the first accused among a group of five accused persons and that all the five pleaded guilty to the charges as laid against them. However, all except the Appellant were released to their parents and ordered to resume schooling. The appellant was subsequently committed to Shikusa Borstal Institution for three years. The Appellant was later ordered to serve the said three years at Shimo la Tewa Borstal Institution. The appellant being aggrieved has lodged the above appeal and now prays for the following orders:-

a. The quashing and/or setting aside the conviction and sentence.

b. An order setting the Appellant at liberty.

6. The Submissions:

Both the Learned Counsels for the Appellant and the Respondent presented oral submissions. Miss Mbuvi for the Appellant submitted that the Appellant was not given legal representation pursuant to section 186 (b) of the Children's Act and that as a result of the Appellant being convicted to Shimo la Tewa Borstal Institution for three (3) years he has been forced join standard seven yet he ought to be in

form Three. She therefore submitted that the appeal be allowed and sentence quashed.

Mr. Cliff Machogu learned prosecution counsel for the Respondent submitted that it was the duty of the lower court and prosecutor to ensure that the subject was represented by an advocate. He further submitted that the trial was defective for want of representation since the minor has been serving an illegal sentence. He conceded to the Application and the Appeal.

7. From the above submissions and the affidavits filed herein, it is clear that the parties herein intend to have this appeal disposed off. Due to fact that the Appellant is a minor, I find it would be fair and just to determine the appeal at this juncture in the best interest of the appellant who is a child as provided for under section 4 of the Children's Act and Article 53 of the Constitutions.

8. Duty of Appellate Court on first Appeal

This duty was established in the case of **OKENO VS R (1972) EA 32** where it was held that on first appeal the courts should reconsider the evidence evaluate itself and draw its own conclusions through it should always bear in mind that it has neither been nor heard the witnesses and should make an allowance in that regard. Indeed a perusal of the lower court record indicates that the Appellant together with four (4) others were convicted on their own plea of guilty. The trial court thereafter called for a Children Officers Report before sentencing. The trial Magistrate dealt with the offenders in two ways. The first one indicates as follows:-

> "**I have considered the Children Officer Report. The 1st subject carried out and executed the plan by setting the dormitory of fire. The fact that he did not back off the plan shows that he needs to be taken to a correctional institution. I therefore order the Probation Office to find placement in a Borstal Institution in respect for the 1st subject. For the 2nd, 3rd, 4th and 5th subjects this court finds them fit for alternative punishment due to the fact that they changed their minds and refused to execute the plan to burn the dormitory. I therefore order the 2nd, 3rd, 4th and 5th subjects be released to their parents who are ordered to ensure that the subjects resume schooling. The Children's Officer shall maintain supervising over the 2nd, 3rd, 4th and 5th subjects for a period of one (1) year. Right of appeal 14 days".**

The Trial Magistrate dealt with the Appellant as follows:

> "**I have considered the Probation Officers Report which recommends rehabilitation for the subject. I have noted that the 1st subject being remorseful after convictions. That he set a dormitory on fire and he has no explanation as to why he did it worrying. It has now become fashionable for Secondary School students to set dormitories on fire on flimsy excuses. A deterrent order is therefore necessary so that the subject can act as an example to other students who may be minded to burn property. The 1st subject is ordered to serve three (3) years at Shikusa Borstal Institution. Right of Appeal 14 days"**

9. Determination:

From the above observations, it is clear that the Appellant was singled out for punishment while his fellow colleagues left out yet they had all been charged together. It appears therefore that the Appellant was not given equal treatment and benefit of law as provided for under Article 27 of the constitution. Again the fact that no legal representation was provided for the Appellant shows that his rights under section 77 and 186 (b) of the Children's Act were violated. It has been submitted on behalf of the Appellant that since his committal to Borstal Institution his education has been interfered with in that he has been forced to attend standard seven classes yet he had been a Secondary School student at the time of the commission of the offence. Indeed the Appellant's rights to education is paramount and it seems his best interest under Article 53 of the Constitution and Section 4 of the Children's Act have been infringed. It is noted that the appellant throughout the proceedings was not accorded any legal representation which could have greatly helped him in that manner in which he responded to the charges

laid against him. This was mandatory under section 77 and 186 (b) of the children's Act and the failure thereof vitiates proceedings and the eventual conviction and sentence.

10. For these reasons, the Appellants appeal succeeds. The conviction is hereby quashed and sentence set aside. The Appellant is ordered set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Machakos this 13th day of February, 2017.

D. K. KEMEI

JUDGE

In the Presence of:

Miss Mbuvi for Appellant

Machogu for state

C/A : Munyao