



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL REVISION NO. 127 OF 2015

**RESIDENT MAGISTRATE, KITHIMANI LAW COURTS.....
APPLICANT**

VERSUS

**EMK.....
RESPONDENT**

RULING ON REVISION

The request for revision is in a letter dated 22nd October 2015 by G.O. Shikwe, the Resident Magistrate at Kithimani Law Courts. The learned magistrate stated that the subject of revision is the Respondent, who is a minor aged 17 years old, who pleaded guilty to the offence of stealing contrary to section 268 of the Penal code. He was fined Kshs.5000/= and in default to serve 3 months custodial sentence. However, that the probation office has since alerted the trial court that the Respondent is serving sentence at Yatta G. K. Prison, having been unable to pay the fine. The learned magistrate consequently sought review of the sentence to accord with the provisions of the Children's Act.

The Respondent herein was charged in Kithimani Senior Resident Magistrate's Criminal Case No. 654 of 2015 with the offence of stealing, contrary to section 268(1) as read with section 275 of the Penal Code. The particulars thereof are that on 17th May 2015 in Yatta sub-county within Machakos County, jointly with another not before the Court, he stole one bag, one spade, two sufurias, one lit, one blanket, one pair of trouser and one solar lamp all valued at Kshs 4,900, the properties of Nicholas Mutua. The Respondent was also charged with an alternative offence of handling stolen goods contrary to section 322(2) of the Penal Code.

The Respondent pleaded not guilty to both the main count and alternative charge on 25th May 2015. After several adjournments in the trial court, the Respondent on 28th September 2015 indicated that he wished to change his plea, upon which the charge was read out to the accused and he pleaded guilty and was convicted. It is however not stated in the trial Court record what charge was read out to the Respondent, and whether the Respondent was convicted of the main charge or alternative charge.

The Respondent was then sentenced on 6th October 2015 to pay a fine of Kshs 5,000/= or three months' imprisonment. The court record of the trial court also showed that on 19th October 2015, the Probation Office requested the trial Court to review the sentence passed on 6th October 2015 as the offender was a minor and was unable to raise the fine.

I have considered the application by the learned magistrate. Section 364 of the Criminal Procedure Code provides for the powers of the High Court on revision as follows in this regard:

“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

With respect to the present application, section 190(1) of the Children Act prohibits the imprisonment or placement of a child, in a detention camp, while Section 191 provides for ways through which a child offender should be dealt with including:

- a. discharging the offender under section 35 (1) of the Penal Code;
- b. discharging the offender on his entering into a recognisance, with or without sureties;
- c. making a probation order against the offender;
- d. committing the offender to the care of a fit person, or a charitable children’s institution
- e. ordering the offender to be sent to a rehabilitation school suitable to his needs and attainments if aged between 10 and 15 years;
- f. ordering the offender to pay a fine, compensation or costs;
- g. committing the child who has attained the age of sixteen years to a borstal institution;
- h. placing the offender under the care of a qualified counsellor;
- i. ordering the child to be placed in an educational institution or a vocational training program;
- j. ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act;
- k. making a community service order.

In light of the above, the sentence of imprisonment imposed on the Respondent was therefore contrary to the law and is hereby set aside. Likewise, in light of the irregularity in the entering of the plea of guilty and conviction of the Respondent for reasons that the charge and applicable section of law was not specified, the conviction of the Respondent is hereby quashed. I accordingly order that the Respondent shall be set free unless otherwise lawfully held.

This ruling and orders to be furnished to the Resident Magistrate at Kithimani Law Courts; the Respondent herein namely EMK; and the Yatta G.K. Prison authorities without delay.

DATED AT MACHAKOS THIS 9th DAY OF NOVEMBER 2015.

P. NYAMWEYA

JUDGE