



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL REVISION NO. 6 OF 2013

From original conviction and sentence by Senior Resident Magistrate at Mwingi in Criminal Case Number 669 of 2011 (Mr. H.M Nyaberi, SRM)

MUTAMBO NGATHI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

Mutambo Ngathi, the applicant, was charged jointly with another with preparation to commit a felony contrary to section 308 (2) of the Penal Code. It was alleged that on 10th October 2011 at Mwingi Township in Mwingi District of Kitui County while not being at their place of abode had articles for use in the cause of or in connection with burglary, namely, metal bars.

The plea was taken on 11th October 2011. The applicant pleaded guilty to the charge and admitted the facts after they were presented in court. The trial court convicted the applicant and sentenced him to serve seven years imprisonment.

The applicant is aggrieved by the sentence and has filed what he refers to as “Application for Mitigation” in which he has listed the following grounds:

- i. That I am the accused person in the mentioned matter.
- ii. That I pleaded guilty to the offence of preparation to commit a felony and I was convicted and sentenced to serve 7 years imprisonment.
- iii. That upon conviction and sentence I was sent first to Kitui Prison then Kamiti Main and now I have been transferred to Kamiti Medium Prison to serve my sentence.
- iv. That I am young and still in my prime age and have my family of brothers and sisters who depend on me for their upkeep.
- v. That for the time I have been in prison I have embraced the virtue of respect for law, reformed and deeply remorseful for my act.
- vi. That I pray to this honourable court to please accept my plea by reducing the sentence or/and revising, reviewing the lower court’s decision and issue me with other orders which fit the circumstances.
- vii. That the said revision, reviewing or reduction will allow me or give me another chance to ease the suffering of my family as I will help them in their needs.
- viii. That I pray to this honourable court to please accept my prayers as I stand to suffer irreparably as a result of my continued stay in prison.

The learned state counsel opposed the mitigation and submitted that the lower court observed all procedure and that the sentence is not excessive and ought not to be disturbed. He submitted that there is no merit in the prayers being sought by the appellant and asked the court to dismiss the same.

I have evaluated the facts presented to the lower court after the plea of guilty was entered. The facts show that the applicant with his co-accused were found hiding in a dark spot; that after police sighted them they started running away. They were chased and arrested. They were found with metal bars. The applicant was found with a metal bar measuring 1 ½ feet with a handle. The metal bar was pointed which the police believed had been adapted for use in breaking doors or windows. He was not able to explain why he was in possession of the metal bar.

The applicant did not dispute these facts. He said they were correct. He was treated as a first offender by the court and sentenced to seven years imprisonment.

The applicant was charged under section 308 (2) of the Penal Code. The penalty for an offence under this section is found in section 308 (4) of the Penal Code which provides as follows:

“Any person guilty of a felony under subsection (2) or (3) is liable to imprisonment with hard labour for five years or, if he has previously been convicted of a felony relating to property, to such imprisonment for ten years.”

To my understand, if the person is a first offender, then the sentence is to a maximum of five years with hard labour but if he has a previous conviction relating to property, then the sentence runs to ten years with hard labour. This is one of the sections under our laws that still retain hard labour in sentences. My personal view is that the drafters of our laws ought to review all laws that seem to go contrary to the spirit and letter of the Constitution 2010 and repeal them for purposes of harmonization.

The record of the lower court shows that the applicant was a first offender at the time of conviction. The trial magistrate is therefore in error in sentencing the applicant to seven years especially when there is no record to show that he had a previous conviction relating to property. This error did not come to the applicant's attention and neither did it come to the attention of the learned state counsel.

The applicant did not explain to the police why he had with him a metal bar adapted for use in breaking doors or windows. To this court, the act of being in a dark place and possessing an article adapted for use in commission of a felony shows that the intentions of the applicant and his co-accused were not good. However, there is no record to show that the applicant had committed any other offence previously as envisaged under the above section.

Having examined and analyzed the circumstances of this case and the errors of the lower court in sentencing, I do hereby make the following orders:

- a. That the conviction of the applicant for the offence under section 308 (2) Penal Code is hereby upheld.
- b. That the sentence of seven years imposed on the applicant by the lower court is hereby set aside.
- c. That the applicant is hereby sentenced to serve two years imprisonment.
- d. That the sentence of two years imprisonment is commuted to the term already served by the applicant.
- e. The applicant is hereby set free from custody unless for any other lawful reason he is held in custody.

It is so ordered.

Dated, signed and delivered this 12th day of June 2014.

S.N.MUTUKU

JUDGE