



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HIGH COURT CRIMINAL REVIEW NO. 202 OF 2019**

**PATRICK WAINAINA NJOROGE.....APPLICANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**R U L I N G**

1. The applicant has moved the court by a chamber summons application, filed on; 5<sup>th</sup> July, 2019, in which he seeks that the Honourable Court be pleased to review the sentence meted upon him vide; Chief Magistrate's Criminal Case No.2043 of 2015 at Kibera Law Courts, Nairobi.

2. The application is supported by undated affidavit sworn by the applicant. He avers that, he was arrested on; 21<sup>st</sup> May, 2015 and charged as aforesaid. He was convicted on 23<sup>rd</sup> June, 2017 and sentenced to serve seven (7) years imprisonment for the offence of preparation to commit a felony. However, the trial court in sentencing him, failed to consider the period of; one (1) and ten (10) months he was in custody during the trial. Therefore, he prays that, the period be considered and the sentence be reduced accordingly.

3. He further avers that; he is remorseful for the offence he committed. That, is the sole bread winner of a young family with two school going children. Further, while in custody, he has undertaken several courses that, will become instrumental in his forward form in life.

4. The application was served, but the Respondent did not file any formal response thereto, hence, it shall be considered unopposed but on merit. In that regard, the application is considered in the light of the material before the court.

5. I note that, the applicant was charged as aforesaid, jointly with another; John Mburu Mbugua with the offence of; preparation to commit a felony contrary to Section 308(2) of the Penal Code in 1<sup>st</sup> count and being in possession of public stores against Section 36 of the Penal Code in the 2<sup>nd</sup> count. The charges were read to each accused and they pleaded not guilty.

6. The case was then fully heard and by a decision rendered on 16<sup>th</sup> June, 2017, the learned trial Magistrate, Hon. J. Kamau (SRM) found each accused guilty on the charge in the 1<sup>st</sup> count and convicted them accordingly, but acquitted each on the 2<sup>nd</sup> count. Pursuant to the conviction, each was sentenced to serve seven (7) years in jail.

7. I note from the trial court record that, before the sentence was meted out, the court indicated that, it had considered each accused records, mitigation and the two years that, the 1<sup>st</sup> accused had been in custody. As a result of the aforesaid, the period in custody has already been considered.

8. Be that as it were, I find that, the next issue to consider is whether the application for review of sentence has merit. First and foremost, the sentence provided for offence of; preparation to commit a felony under section 308 (2) of the Penal code. The provisions thereof state as follows: -

*“Any person who, when not at his place of abode, has with him any article for use in the course of or in connexion with any burglary, theft cheating is guilty of a felony, and where any person is charged with an offence under this subsection proof that he had with him any article made or adapted for use in committing a burglary, theft or cheating shall be evidence that he had it with him for such use”*

9. The penalty for the aforesaid offence, is provided for under Section 308(4) of the Penal Code. It states that:

*(4) any person guilty of a felony under sub section (2) or (3) is liable to imprisonment with hard labour for five (5) years or if he has previously been convicted of a felony relating to property to such imprisonment for ten years”*

*(emphasis added)*

10. Pursuant to the aforesaid, the applicant having been convicted of the offence under section 308 (2) of the Penal Code, the maxim sentence that should have been imposed is five (5) years, with hard labour. The sentence cannot have been enhanced as the trial record indicates that, each accused was treated as a first offender.

11. In that regard, the sentence meted out of a period of seven years is incorrect, irregular, illegal and or improper. Pursuant to the provisions of; section 362 of the Criminal Procedure Code, as read together with; section 364 thereof, I hereby set aside the sentence meted against the applicant by substituting the sentence imposed of seven (7) years in jail and substitute it with a custodial sentence of five (5) years in jail with hard labour.

12. The sentence imposed shall take effect from; 23<sup>rd</sup> June, 2017. If the applicant has served the sentence, notwithstanding, the fact that, he may not have served it with hard labour, taking into account the fact that, the failure to serve the sentence with hard labour was not his mistake, he shall in the interest of justice be released forthwith, unless otherwise lawfully held.

Those then are the orders of the court.

**DATED, DELIVERED AND SIGNED ON THIS 30TH DAY OF DECEMBER, 2021.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Applicant in person

Ms Chege for Respondent

Edwin: Court Assistant