



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NANYUKI**

**CRIMINAL APPEAL NO 126 OF 2017**

**STEPHEN MITHIKA MUTIGA .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal from Original Sentence dated 08/09/2016 in Nanyuki CM Criminal Case No 506 of 2017 - W J Gichimu, PM)**

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

1. The Appellant in this appeal, **STEPHEN MITHIKA MUTIGA**, was convicted after trial of *preparation to commit a felony* contrary to **section 308(1)** of the *Penal Code*. On 8th September 2017 he was sentenced to serve 7 years imprisonment. He has appealed only against that sentence.

2. In his written “petition of mitigation” the Appellant has stated that he was a first offender and remorseful; that he is a father of needy children; that he is diabetic; and that the trial court did not take into account that he had been in custody for almost a year during his trial.

3. Learned prosecution counsel on the other hand opposed the appeal. He submitted that the minimum sentence for the offence provided for by law is 7 years imprisonment, with a maximum of 15 years; and that therefore the sentence awarded to the Appellant was not only lawful, but also the minimum that the trial court could have imposed.

4. Section 308(1) of the Penal Code under which the Appellant was convicted states-

**“Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years.”**

5. Upon the wording of that subsection, the trial court had the discretion whether to impose a custodial sentence or some other form of punishment. But once the trial court decided upon a custodial sentence, then its hands were tied and it had to award at least seven (7) years imprisonment.

6. The particulars of the offence in the charge alleged that on 02/04/2017 at about 9.40 pm at *East African Pentecostal Church* in Timau, Meru County, jointly with another not before the court, the Appellant was found armed with dangerous weapons, namely a knife and a pair of scissors in circumstances that indicate that he was so armed with the intent to commit the felony of stealing.

7. Having found the Appellant guilty of the offence, it was entirely the discretion the trial court whether in the circumstances of the case a custodial sentence was deserved. Where a minimum custodial sentence is provided for an offence in discretionary terms, i.e., *...is liable to imprisonment of not less than...* as opposed to mandatory terms, i.e. *...shall be sentenced to...*, it behoves the trial court to first consider the preliminary issue if a custodial sentence is deserved in the circumstances of the case. This is because the court has the discretion to award a punishment other than a custodial one. But once the court settles on a custodial sentence, then it must award the minimum provided by the law concerned. There is no indication in the trial court’s notes that it was aware that it had that discretion.

8. In the present case, the Appellant was armed only with a knife and a pair of scissors; he was a first offender who had been in custody for almost a year during his trial. Had the trial court been aware that it had the discretion to consider a non-custodial sentence, it probably would have awarded one.

9. As the first appellate court, I have the same sentencing power as the trial court. I consider that in this present case a custodial sentence was not merited, and I will set aside the sentence of seven (7) years imprisonment imposed upon the Appellant. I will substitute therefor a fine of KShs. 55,000/00 and in default of payment imprisonment for twelve (12) months. As the Appellant has been serving sentence since 8<sup>th</sup> September, 2017, he has long served the default sentence. He shall therefore be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 24<sup>TH</sup> DAY OF APRIL 2019**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 25<sup>TH</sup> DAY OF APRIL 2019**