



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL APPEALNO. 147 OF 2014

GEORGE RAI NGAOAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being a mitigation appeal on the judgment delivered by the Resident Magistrate's court at MARIAKANI on the seven (7) years imprisonment imposed upon me on 7th August, 2014 vide Criminal case No. 580 of 2013)

JUDGMENT

The appellant, GEORGE RAI NGAO jointly with another were charged with preparation to commit a felony contrary to section 308 (1) of the Penal code.

The particulars were that;

“On the 20th day of December,2013 at Bonje area, along Mombasa Nairobi Highway in Rabi District within Kilifi County of the Coast Region, the appellant jointly with others were found armed with offensive weapons namely, a metal bar cutter and a knife in circumstances that they were so armed with intent to commit a felony namely theft”

The Appellant pleaded NOT GUILTY to both counts. The case proceeded to full trial whereby the appellant was convicted and sentenced to serve seven (7) years imprisonment.

Upon being aggrieved by the conviction and sentence, the appellant preferred this appeal. The appellant abandoned the appeal against conviction and sought to have the sentence preferred against him reduced on the grounds that:

- 1.he is remorseful and begs for forgiveness;
- 2.the seven years sentence, though within the prescribed sentence, is harsh and his life and that of his family will be completely ruined if he serves the full duration in prison as he was their sole bread winner;
- 3.that the period he has so far spent in prison is enough to make him realize a positive change and regrets the shameful act;
4. that if given at opportunity to rejoin the society, he promises to remain a law abiding person and be a role model to others in society by helping the youth disassociate from criminal activities;

5. that he has undergone religious programmes and is now a God- fearing person;

6. that he has now acquired skills in plumbing which makes him feel well equipped to join other fundis in earning a living and lead a good life without engaging in criminal activities

He prays for a non-custodial sentence to enable him look after his family.

Mr Ayodo, learned state counsel opposed the appellant's appeal.

He urged that the trial magistrate considered the appellant's mitigation and sentenced him to the minimum period provided for under Section 308 (1) of the Penal code which provides that;

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

The state counsel urged the court not to interfere with the said sentence and dismiss the appeal.

I have considered the grounds of mitigation by the appellant together with the submissions by both the appellant and learned counsel for the state.

I find that the appellant has not challenged his conviction that was imposed against him. He is seeking to benefit from parole on the claims that he;

1. is remorseful and asking for forgiveness;
2. has realized a positive change and regrets the shameful act
3. promise to remain a law abiding person and role model in society where by he will assist youth to disassociate from criminal activities.
4. has undergone religious programmes and is now a God fearing person;
5. has acquired skills in plumbing which he feel has equipped him to joint others fundis in earning a living and lead a good life without engaging in criminal activities.

From the records, I believe the Honorable magistrate considered all the factors surrounding the case and took into account the record and mitigation statement of the appellant which influenced the sentence he meted against him.

The sentence of seven (7) years that was meted against the appellant is the minimum sentence provided for under section 308 (1) of the penal which he was charged.

It is now trite law that where a statutory sentence is provided for this court has no discretion, but to give effect to the law.

The High court will only interfere where it is demonstrated that there was failure of justice., by the trial court meting out an unlawful or wrong sentence against an appellant, as against the law.

From the reasons given by the appellant in his grounds of appeal, mitigation and submissions, it is clear that he is seeking further leniency. This court is not privy to the matters he has raised in his grounds of mitigation as these are only matters that were canvassed during the trial.

The only institution with the capacity to validate these claims by the appellant is the prison authorities, which can use the same to recommend to the Advisory committee on mercy for the president to exercise his power of mercy for the appellant under Article 133 of the Constitution, 2010.

This honorable court is “functus officio” on the matters.

It is so ordered.

Judgment delivered, signed and dated this 28th day February 2017.

D. O .CHEPKWONY

JUDGE

In the presence of:

M/s Ocholla for the state

The Appellant in person

C/clerk- Kiarie