

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.288 OF 2015

BONIFACE OUMA OMOLLO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Boniface Ouma Omollo was charged and convicted of two counts. He was charged with the offence of **preparation to commit a felony** contrary to **Section 308(1)** of the **Penal Code**. He was sentenced to serve seven years imprisonment. He was further charged with being in possession of **narcotic drugs (cannabis sativa)** contrary to **Section 3(1)** as read with **Section 3(2)(a)** of the **Narcotic and Psychotropic Substances Control Act**. He was fined Kshs.30,000/- or in default he was sentenced to serve nine (9) months imprisonment. The Applicant was sentenced on 12th May 2014. He did not appeal against conviction. He has however applied to this court for reduction of sentence by way of an application for revision.

During the hearing of the application, the Applicant told the court that he was remorseful, had learnt his lesson, had reformed, had been rehabilitated and was ready to rejoin the society as a useful member. The Applicant told the court that during his incarceration, he had become sick and was under medication. He was of the view that he would secure better treatment if he was treated while at home. Ms. Sigei for the State opposed the application for reduction of sentence. She submitted that the sentence imposed upon the Applicant was legal. Indeed, it was most lenient as it was the minimum sentence that the trial court was permitted in law to sentence the Applicant. She urged the court to take into consideration the serious nature of the offence that the Applicant was convicted. She submitted that the medical condition that the Applicant was suffering from can be treated while the Applicant is in prison. She urged the court to dismiss the application for reduction of sentence.

When the trial magistrate sentenced the Applicant to serve the custodial sentence, it was exercising judicial discretion. This court can only interfere with such exercise of discretion if it is established, either that the sentence was too harsh or too lenient in the circumstances. The court will also interfere with the imposition of custodial sentence if it is established that the trial magistrate applied the wrong principles of the law in sentencing the Applicant or that the sentence was illegal.

In the present appeal, it was clear to this court that the trial court sentenced the Applicant to serve a legal custodial sentence. However, in the present application, it was evident that the trial court did not take into account the period that the Applicant was in remand custody before his conviction. This court also perused the proceedings of the trial court and noted that if the Applicant had appealed against conviction, most probably his appeal would have been allowed on the ground that the prosecution did not establish to the required standard of proof beyond any reasonable doubt that at the time that he was arrested the Applicant was preparing to commit a felony.

The Applicant was arrested while walking along a road in a residential area. It was about 9.45 p.m. Yes, he may have been found with an axe. But the mere fact that he was found with an axe at that time of the night was not sufficient proof that he was preparing to commit a felony. It was apparent that the trial court inferred guilt on the part of the Applicant by virtue of the fact that he run away when he saw the police. This court is of the view that the Applicant's action was not unusual taking into consideration the fear

sometimes ordinary citizen have of the police especially when they meet them at night while they are on patrol. There is no other evidence adduced by the prosecution that would have pointed to the assertion by the prosecution that the Applicant was at the time actually preparing to commit a felony. That is, however, now water under the bridge since the Applicant did not appeal against conviction. The court has however taken this fact into consideration when determining this application for reduction or revision of sentence.

For the above reasons, the Applicant's application for reduction of sentence is hereby allowed. His custodial sentence is commuted to the period served. He is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2017

L. KIMARU

JUDGE