

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.85 OF 2015

JOHN LENKASURAI.....APPLICANT

REPUBLIC.....RESPONDENT

RULING

The Applicant, John Lenkasurai was charged with the offence of **preparation to commit a felony** contrary to **Section 308(1)** of the **Penal Code**. The particulars of the offence were that on 30th March 2014 at Kabiria in Riruta within Nairobi County, he was found armed with an offensive weapon, namely a metal bar, in circumstances that indicated that he was so armed with intent to commit a felony, namely burglary. When the Applicant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to serve seven (7) years imprisonment.

The Applicant moved this court by way of revision seeking to have the custodial sentence that was imposed on him reduced. He is not challenging his conviction. He told the court that he has reformed in the period that he has been in prison. He has a family which solely relies on him. He will be a useful member of society upon his release from prison because he has learnt a trade. He pleaded with the court to exercise leniency on him. Ms. Kule for the State opposed the application. She submitted that the sentence that was imposed on the Applicant was the minimum sentence provided by the law. The Applicant was found in a place that was not his usual residence. It was clear that he was there with the intention to commit a felony. She urged the court not to interfere with the sentence.

This court has carefully considered the facts of this case. It also had the benefit of perusing the proceedings and the judgment of the trial court. This court is aware that when the trial court was exercising its discretion to sentence the Applicant, it did so under powers granted to it by the law. However, this court has jurisdiction to interfere with the sentence if it appears to it that the sentence was either unlawful, too harsh or too lenient as not to approximate the appropriate sentence for the crime committed.

In the present application, it was clear that the circumstances under which the Applicant was arrested did not suggest that he was at the place with the intention to commit a crime. The police officer who testified in the case told the court that he arrested the Applicant while he was walking in a public road with a group of other men. The reason why he was charged and convicted was because he was found in possession of a crowbar on his arrest. No evidence was adduced of the likely felony that the Applicant could have committed in a public road. Although the Applicant did not appeal against his conviction, this court is of the view that he ought not to have been convicted in the first place.

The charge of preparation to commit a felony was not established to the required standard of proof. The evidence that the prosecution presented to the court in respect to spates of burglaries that has taken place within the area was not sufficient to connect the Applicant to the charge that was laid against him. He was not found in the vicinity of a residential house in a manner likely to suggest that he intended to commit a crime. For the charge of preparation to be established, the prosecution must prove that the accused took certain positive steps towards actualizing the crime but was prevented from doing so by the intervention of law enforcement agents. That was not the position in this case.

In the premises therefore, this court formed the opinion that the Applicant was a victim of miscarriage of

justice. His conviction is quashed. The sentence imposed upon him is set aside. He is ordered set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 18TH DAY OF MAY 2016

L. KIMARU

JUDGE