



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 185 OF 2011**

**FRANCIS MWANIKI MWANGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....REPUBLIC**

*(Appeal against conviction and sentence in the Karatina Principal Magistrates' Court Criminal Case No. 637 of 2011 (Hon. Mbugua) delivered on 29<sup>th</sup> July, 2011)*

**JUDGMENT**

The appellant was charged with the offence of preparing to commit a felony contrary to **section 308 (1)** of the **Penal Code** in the **Principal Magistrate's Court at Karatina, Criminal Case No. 637 of 2011**. The particulars were that on the 26<sup>th</sup> day of July, 2011 at Kirima village in Mathira West District within Central Province, not being at his place of abode, the appellant had with him an article for use in the course of or in connection with burglary namely a panga and a crow-bar. He was convicted on his own plea of guilty and sentenced to seven years imprisonment.

Despite having pleaded guilty, the appellant appealed against conviction and sentence; however, when the appeal came up for hearing, he abandoned the appeal against conviction and only asked this court to consider reducing the sentence.

Mr Njue for the state opposed the appeal and urged that the minimum sentence prescribed for the sort of offence the appellant was charged with is seven years imprisonment; this was the sentence that was meted out and thus it should not be disturbed.

The record shows that the appellant pleaded guilty to the charge; he also confirmed the facts to be true. The plea was thus unequivocal and therefore the appellant was duly convicted on his own plea of guilty. The only question for determination in this appeal is whether the sentence meted out against him was harsh or whether it was open to the learned magistrate to mete out any other penalty other than the custodial sentence. The answer to this question lies in **section 308 (1)** of the **Penal Code** under which the appellant was charged; it states as follows:-

***308. Preparations to commit felony***

*(1) 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.*

It is apparent from this provision of the law that the sentence the appellant is asking this court to reconsider is not only the mandatory minimum sentence that the trial court could possibly mete out but it is also the only sentence prescribed; there is neither room for a fine in lieu of the prison term nor a non-custodial sentence.

Considering the mandatory provision of **section 308(1)** of the Code, the appellant's appeal, in my humble view, ought not to have been admitted in the first place; it should have been rejected summarily under

**section 352 of the Criminal Procedure Code, Cap. 75.**

There is little else to say about the appellant's appeal except to dismiss it; it is so dismissed.

**Signed, dated and delivered in open court this 9<sup>th</sup> December, 2016**

Ngaah Jairus

**JUDGE**