



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.209 OF 2012**

*(An Appeal arising out of the conviction and sentence of HON. T. Mwangi - SRM delivered on 23<sup>rd</sup> July 2012 in Makadara CM.C. CR. Case No.1625 of 2012)*

**JOSEPH KAMAU NJOROGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

Joseph Kamau Njoroge, the Appellant herein was charged with the offence of **attempted robbery with violence** contrary to **Section 297(2)** of the **Penal Code**. The particulars of the offence were that on 5<sup>th</sup> April 2010 at Mwiki – Kasarani Road in Nairobi, the Appellant jointly with another not before court, while armed with a screwdriver attempted to rob John Njoroge Mwangi of his motor vehicle Registration No. KAR 141D Toyota 110 valued at Kshs.400,000/- and at or immediately before or immediately after the time of such attempted robbery used actual violence to the said John Njoroge Mwangi. When the Appellant was arraigned before the trial magistrate’s court, he pleaded not guilty to the charge. After full trial, he was found guilty of the lesser but cognate offence of **attempted robbery** contrary to **Section 297(1)** of the **Penal Code**. He was sentenced to serve four (4) years in prison. The Appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

During the hearing of the appeal, the Appellant abandoned his appeal on conviction. Instead, he pleaded with the court for a reduction of sentence. He told the court that he was in remand for a period of two years and four months prior to his conviction. While in prison, he had learnt several trades including masonry, tree grafting and had qualified as a pastor. He told the court that he wanted to be a role model. He pleaded for the court to exercise leniency on him. Ms. Aluda for the State opposed the appeal. She was not impressed by the entreaties of the Appellant. She submitted that the Appellant ought to have been sentenced to serve a more severe sentence than the one that he is currently serving. She stated that the prosecution had established the necessary ingredients to support the charge of **attempted robbery with violence** contrary to **Section 297(2)** of the **Penal Code** which calls for a more severe sentence. She urged the court not to be persuaded by the submission made by the Appellant and instead dismiss the appeal.

This court has carefully considered the plea by the Appellant for reduction of sentence. When the Appellant was sentenced to serve the custodial sentence, the trial court was exercising its judicial discretion. As an appellate court, this court will only interfere with such exercise of judicial discretion if it is established that the sentence was manifestly harsh and excessive or was so lenient as to amount to a miscarriage of justice. This court will interfere with the sentence if it is established that the sentence was unlawful. In the present appeal, it was clear to this court that the Appellant was lucky that he was sentenced to serve a lesser severe sentence than he would have otherwise served. On perusal of proceedings of the trial court, this court is of the view that the trial court should have made the finding that the prosecution had established its case on the charge of **attempted robbery with violence** contrary to **Section 297(2)** instead of **Section 297(1)** of the **Penal Code** that the Appellant was convicted of. This court agrees with Ms. Aluda for the State that the Appellant should ride his luck and serve the remainder

of the sentence that was imposed by the trial court because he would have otherwise served a more severe sentence.

In the premises therefore, the appeal lodged by the Appellant lacks merit and is here by dismissed. The Appellant will serve the sentence imposed by the trial magistrate. It is so ordered.

**DATED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JULY 2015**

**L. KIMARU**

**JUDGE**