



IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL REVISION NO. 3 OF 2011

WILLY KIBET MUTAI & 36

OTHERS.....APPLICANTS

VERSUS

REPUBLIC.....

.....RESPONDENT

REVISION ORDER

37 accused persons were charged with the offence of being found armed with dangerous or offensive weapons in circumstances that indicated that they were so armed with intent to commit felony contrary to **Section 308(1)** of the **Penal Code**. 29 accused persons were found guilty and convicted of the offence. The court sentenced them to a fine of Kshs.20,000/- in default one year imprisonment.

A person found guilty under **Section 308(1)** of the **Penal Code** is liable to imprisonment for not less than seven years imprisonment and not more than fifteen years. The sentence which the magistrate meted out on the accused persons is illegal. The sentence should have been between 7 years imprisonment and 15 years imprisonment. The default sentence can not therefore be 1 year’s imprisonment. **Section 28(2)** of the **Penal Code** gives a guideline on how much fine is to be imposed for certain periods of imprisonment. It is as hereunder:-

“S28(2) In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale –

<u>Amount</u>	<u>Maximum Period</u>
Not exceeding Sh.500	14 days
Exceeding Sh.2,500	1 month
Exceeding Sh.2,500 but not exceeding Sh.15,000 ...	3 months
Exceeding Sh.15,000 but not exceeding Sh.50,000	6 months
Exceeding Sh.50,000.....	12 months”

A fine of Kshs.20,000/- could only attract a default sentence of 6 months, while Kshs.50,000/- attracts a default sentence of 12 months. If the court in its discretion was of the view that it wanted to impose a non custodial sentence on the accused persons then the fine should equate to not less than 7 years imprisonment and it should have been much more than what was imposed. Exercise of discretion could only have been within the law i.e. **Section 308(1)** of the **Penal Code**.

The court sentenced the accused persons on 6/1/2011. So far 19, accused persons have paid their fines and have been released. They may never be traced. It is my view that this revision has come too late in the

day. It should have been sought in good time so that all the accused persons could have been subject to the revision order. If this court were to go ahead to revise the lower court's order in respect of the remaining eight (8) accused persons, that would be discriminatory as against them because the revision order is likely to be prejudicial to them as the sentence would have to be between 7 years to 17 years imprisonment. This court is surprised that despite the fact that the sentence was of glaringly illegal, the State did not deem it necessary to file an appeal against the sentence. It seems both the court and prosecution did not bother to consider provisions of **Section 308(1)** of the **Penal Code**.

For justice to be seen to be done to all the accused persons herein, this court declines to revise the sentence of the magistrate though illegal. The prosecution can file an appeal if they deem it necessary.

This order should be served on the trial magistrate and the State Counsel in charge- Rift Valley Province.

DATED and DELIVERED this 12th day January, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

.....for the state.

Kennedy – Court Clerk.