



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Criminal Appeal 214 of 2008
(An Appeal from original conviction and sentence in Nakuru
C.M.CR.C.NO.4553/2008 by Hon J. G. King'ori
Ag. Senior Principal Magistrate, dated 8th September, 2008)
JOSEPH MBURU KUNGU.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT
JUDGMENT

The appellant having pleaded guilty to the offence of preparation to commit a felony contrary to **section 308(2)** of the **Penal Code** was upon conviction sentenced to ten (10) years imprisonment with hard labour. He has preferred this appeal challenging both the conviction and sentence on five grounds, which he abandoned when the appeal came up for hearing, only retaining the ground on the sentence.

Learned counsel for the respondent noted that the learned trial magistrate misunderstood the sentence to be imposed for the offence under **section 308(2)** and instead imposed a sentence provided for under **section 308(1)**.

In sentencing the appellant, the learned magistrate remarked that:

“Offence is quite serious. It attracts a minimum sentence of 10 years and a maximum of 14 years with hard labour. As a first offender, I shall impose a minimum sentence which is 10 years imprisonment with hard labour.”

No doubt the learned magistrate relied on the amended **section 308(1)** which relates to a person who is found armed with a dangerous or offensive weapon. By **Act No.22 of 1987** the sentence of fourteen years (not exceeding) and hard labour was amended.

Act No.5 of 2003 provides that any person found guilty under **section 308(1)** is liable to imprisonment of not less than seven years and not more than fifteen years. The appellant was charged under **section 308(2)** whose punishment is provided for under **sub-section (4)** as imprisonment with hard labour for five years, unless he has been previously convicted of a felony relating to property in which case the sentence is ten years. There was no evidence that the appellant had a previous conviction. To the extent that the sentence was based on a wrong provision of the law and in turn was excessive, this appeal succeeds and it is ordered that the sentence be and is hereby set aside, and substituted therefor, in terms of **section 354(3)(b)** of the **Criminal Procedure Code**, with three (3) years imprisonment taking into account the years he has served.

Dated, Signed and Delivered at Nakuru this 5th day of March, 2010.

W. OUKO

JUDGE