REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 480 of 2006

From original and conviction and sentence in Criminal Case No. 967 of 2006 of the Senior Resident Magistrate's Court at Githunguri)

JOHN KAMAU WAWERU…….……..APPELLANT

VERSUS

REPUBLIC …….....…RESPONDENT

J U D G M E N T

JOHN KAMAU WAWERU, the appellant, was charged before the subordinate court with preparation to commit a felony contrary to section 308(1) of the Penal Code. After a full trial he was convicted and sentenced to 7 years imprisonment. He has now appealed to this court against sentence. He abandoned his appeal against conviction.

At the hearing of the appeal the appellant submitted that he wanted the court to consider reducing his sentence. The learned State Counsel, Ms. Gateru, opposed the appeal against sentence on the ground that the sentence of 7 years was reasonable, considering that the maximum sentence for the offence was 14 years imprisonment.

It is well settled that sentencing is the discretion of the sentencing court, and an appellate court will be slow to interfere with the exercise of that discretion, unless the sentencing court took into account an irrelevant factor or that it failed to take into account a relevant factor or that it applied a wrong principle or short of these the sentence is so harsh and excessive that a wrong principle must be inferred – see SHADRACK KIPROTICH KOGO –VS- REPUBLIC – Criminal Appeal No. 253 of 2003 Eldoret (CA).

Indeed, in our present case the maximum sentence is 14 years imprisonment with hard labour. The learned magistrate sentenced the appellant to serve 7 years imprisonment. Before sentencing, the prosecutor stated that the appellant was a first offender. In mitigation the appellant is recorded as having said that he was sickly and had an appointment at Kenyatta National Hospital for an operation on his private parts. The learned magistrate, in the notes on sentencing, stated that he had considered the mitigation, that the appellant was a first offender, but that the appellant was not remorseful. He observed that the offence was serious and (harsh) punishment was called for. He imprisoned the appellant for 7 years.

In my view, though the appellant did not say specifically which he was remorseful, there was nothing on record that could suggest that he did not care about the seriousness of the offence committed. The facts of the offence themselves did not have any aggravating factors. The appellant was found at Githunguri township with a machete hidden and his jacket talking to watchman at 2 a.m. When the machete was discovered, the appellant started running away but was restrained. In my view, the harsh and excessive sentence of half of the maximum sentence for a first offender was harsh and excessive. In my view, the harshness of the sentence shows that the learned magistrate must have applied a wrong principle in determining the sentence. Therefore, on that account I will interfere with the exercise of of in sentencing by the learned trial magistrate in sentencing. I will reduce the sentence to 4 years imprisonment.

Consequently, I order as follows ?

1. I quashed set aside the 7 years prison sentence imposed by the learned magistrate;

2. I order that the appellant will instead serve a sentence of 4 years imprisonment from the date on which he was sentenced by the subordinate court.

It is so ordered.

Dated and delivered at Nairobi this 18th day of February 2008**.**

George Dulu

Judge

In the presence of –

Appellant in person

Ms. Gateru for State - absent

Mwangi – court clerk