REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
APPELLATE SIDE
CRIMINAL APPEAL NO. 92 OF 2000

MUTHENYA MUTISYA :: APPELLANT

VERSUS

REPUBLIC :: RESPONDENT

J U D G E M E N T

The appellant pleaded guilty to the charge under S.297(1) Penal Code in that on 24.12.99 at Ngulini village, Machakos with others not before court while armed with rungus and petrol attempted to rob Joseph Ngila of unknown property from his house at 3 a.m. and immediately before or after such attempted offence threatened to use actual violence on the said Ngila.

Facts were reproduced which seemingly constituted the offence. They were admitted and the appellant was convicted accordingly. Treated as a first offender the appellant had nothing to say in mitigation. The Learned Trial Magistrate then imposed a 7 year – prison term, the maximum under S. 297(1) Penal Code without adding the mandatory strokes or 5 years under police supervision on release. Had the Learned Trial Magistrate looked up her law at the time of handing down the sentence, all this could have been more than amply clear to her for imposition. As said in many judgements of this court and circular guidelines to all magistrates under this High Court, it is repeated that it is incumbent on every judicial officer to look up the law lest an unlawful sentence/order he imposed as it was here.

At the trial where the appellant did not appear after he was notified that he would do so at his own expense the Learned State Counsel similarly overlooked the omitted aspects of the sentence as pointed out above. She however supported the sentence.

In this court's view the plea of guilty was fairly properly taken, save that the trial magistrates should as much as possible take down in the words spoken by the accused in answer to a charge read and explained to him. Recording that :

"It is true,"

has been said here many times that that is insufficient in a plea of guilty (see S.207 Criminal Procedure Code ADAN VS. R {1973} E.A 445, JOSEPH MUSAU VS. R. MACHAKOS CR.A. 118/2000 Unreported) However the facts admitted constituted the offence. The appellant stated in his appeal that he did not have a chance to defend himself. To this the court notes that when he pleaded guilty to the charge, the issue of defence could not arise. He could say something in mitigation only and he said nothing. The

petition added that on completion of 7 years imprisonment the appellant would be ruined. In essence, the appellant was saying that the prison term was harsh and excessive.

The appellant was a first offender. The Learned Trial Magistrate did not record any remarks as to why she meted out the maximum prison term under S. 297(1) Penal Code. It is a principal in sentencing that unless there are aggravating or extenuating circumstances to warrant a maximum prison term under any provision of law, a term less than that maximum should be imposed. By doing so the appellate court is left with some leeway in case it is obliged to increase the sentence.

In that regard, the lower court sentence is set aside and substituted with one of five (5) years imprisonment, four (4) strokes of the cane and subject to 5 years police supervision on release.

Save for that variation of sentence, this appeal is dismissed.

Judgement accordingly.

Delivered on 22nd January 2001.

J. W. MWERA

JUDGE