



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. 81 OF 2018**

**BETWEEN**

**HARRIZON OMONDI OWINO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal against Conviction and Sentence imposed in Criminal Case Number 209 of 2017*

*in the Senior Resident Magistrate's Court at Winam delivered on 23.7.18 by Hon. J.Mitey(RM)*

**JUDGEMENT**

**The Trial**

1. On 23rd July, 2018, the Appellant was convicted for the offence of preparation to commit a felony contrary to section 308(1) of the Penal Code Chapter 63 Laws of Kenya was sentenced to serve 7 years imprisonment.

**The Appeal**

2. Being dissatisfied with the conviction and sentence, the Appellant lodged the instant Appeal. In his Petition of Appeal filed on 7<sup>th</sup> July, 2018, Appellant raised 5 grounds of Appeal and he mainly appeals against sentence.

3. When the Appeal came up for hearing on 28th February, 2019, the Appellant indicated that he was relying wholly on the Petition of Appeal and also on Submissions filed on 28th February, 2019. Ms Gathu, learned counsel for the state opposed the appeal and submitted that the sentence was lawful and lenient.

**Analysis**

4. The Court of Appeal in the case of **GABRIEL NJOROGE VS REPUBLIC (1982 - 88) 1 KAR 1134** described the role of the first Appellate Court on an Appeal from the subordinate Court in the following terms:-

***“...As this Court has constantly explained, it is the duty of the first Appellate Court to remember that the parties to the Court are entitled, as well on the question of fact as on the question of law to demand a decision of the Court of the first Appeal, and as the Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect....”***

5. The evidence on record demonstrates that the Appellant was repulsed from the complainant's home before he could manage to break in. He was arrested and from him were recovered two metal bars.

6. Sentencing Policy Guidelines, 2016 (“the Guidelines”) published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider

the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances.

7. *Clause 7.17 of the guidelines provides that* where the law provides mandatory minimum sentences, then the court is bound by those provisions and must not impose a sentence lower than what is prescribed.

8. Section 308 of the Penal Code under which the Appellant was charged provides for an imprisonment term of not less than seven years and not more than fifteen years. I therefore agree with the state that the sentence passed on the Appellant is a lawful one.

9. As stated hereinabove, Appellant was repulsed before he could manage to break into complainant's home. He had 2 metal bars at the time of arrest. Bearing in mind these circumstances, I am of the considered view that the objectives of sentencing can still be met by way of a non-custodial sentence. The court is aware of the high rates of recidivism associated with imprisonment.

10. I requested for a Probation Report and it was filed on 20th March, 2019 recommending the Appellant for a non-custodial sentence.

11. From the foregoing analysis, the conviction is upheld but the sentence of 7 years imprisonment is set aside and substituted with a Probation term of 3 (three years). It is hereby so ordered.

**DELIVERED AND SIGNED AT KISUMU THIS 4<sup>th</sup> DAY OF April 2019**

**T. W. CHERERE**

**JUDGE**

**IN THE PRESENCE OF:**

**Court Assistant - Felix**

**Appellant - Present in person**

**For the State - Mr. Muia**