



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 107 OF 2017

DANIEL NTHENGE KINGELI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Being an appeal against the Judgement and sentence of T. N. Sinkiyian (RM) in Kangundo SPMC CR. Case No. 1129 of 2015 delivered on 25th July, 2015)

JUDGEMENT

1. The Appeal herein is against the sentence of Hon T. N. Sinkiyian R.M. in Kangundo SPMC Criminal Case Number 1129 of 2015 dated 25/07/2016.

2. The Appellant **DANIEL NTHENGE KINGELI** had been charged together with three others with the offence of preparation to commit a felony contrary to Section 308 (1) of the Penal Code. The particulars were that on the 17th day of December, 2015 at around 12.15 a.m. at Tala Township in Matungulu Sub-County within Machakos County, were found armed with dangerous weapons namely Axe, hammer and a knife in circumstances that indicated that they were so armed with intent to commit a felony namely breaking. The Appellant after a full trial was convicted and sentenced to serve seven (7) years imprisonment.

3. The Appellant being aggrieved by the sentence filed several grounds of appeal in mitigation as follows:-

- i. That he was a first offender;
- ii. That he was remorseful;
- iii. That the Appellant is the breadwinner of his nucleus family with one child who solely depends on him after his wife died;
- iv. That he is an orphan with a brother who suffers from insanity and who requires to be taken care of by him;
- v. That he is reformed and ready to be integrated back to the society;
- vi. That this court has unlimited jurisdiction to allow the appeal;
- vii. That he undertakes to be a law abiding citizen once granted his liberty.

4. Parties agreed to canvass the appeal by way of submission. The appellant filed written submissions while learned counsel for the Respondent presented brief oral submissions.

5. The Appellant submitted that the trial court ought to have considered the fact that he was a first offender and mete out a lesser sentence. He further submitted that the purpose of sentencing is to achieve the right balance between retribution, deterrence and punishment but however rehabilitation should also be considered for him now that he has undergone the same in prison. He further submitted that his family has suffered due to his absence. Finally he submitted that he is HIV positive and suffers from Tuberculosis which has led him to be segregated from the other prisoners.

6. Mr. Machogu, learned counsel for the Respondent submitted that the Appellant has not raised sufficient grounds to enable this court to interfere with the decision of the trial court in terms of sentencing. He sought for the dismissal of the appeal.

7. This being a first appeal, this court is obligated to analyze the matter afresh so as to arrive at its own independent conclusion. However, it

is noted that the Appellant was taken through a full trial before the trial court and was subsequently convicted and sentenced to serve seven (7) years. From the petition of appeal, it is clear that the Appellant is not appealing against the conviction but only on sentence. He is seeking for the sentence to be lessened as supported by his grounds of appeal and submissions.

8. The Appellant had been charged with the offence of preparation to commit a felony contrary to Section 308(1) of the Penal Code which provides as follows:-

“Any person found armed with any dangerous or offensive weapons in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years”

The Appellant did present his mitigation before the trial court. The said learned magistrate did consider the Appellant’s mitigation and proceeded to mete out the minimum sentence of seven years imprisonment. Indeed the trial court exercised its discretion while meting out the sentence. It considered all the relevant factors and in line with the provisions of Section 308(1) of the Penal Code. I find the said sentence is the minimum possible in law. The appellant has not raised any sufficient grounds to enable this court to interfere with the decision of the trial court in terms of sentencing. The Appellant has not shown any reasons to the effect that the trial court had improperly exercised its discretion when it sentenced him to seven years imprisonment which is really the minimum provided for. I am unable to find any error on the part of the trial court warranting this court to disturb the sentence imposed.

9. The Appellant has claimed to have been rehabilitated while in prison and further claimed that he is HIV positive. It is noted that the Appellant has only served about two (2) years in prison out of the seven years imposed. Further as regards his medical condition, I find the prison authorities are fully prepared and equipped to address any medical challenges posed to prisoners. As to whether the Appellant has been rehabilitated in prison, that is a matter within his knowledge and can only be ascertained through probation officer’s report. No such report has been called for and hence the Appellant shall have to await his chance during the frequent prison decongestion exercise.

10. In the result, I find the Appellant’s appeal lacks merit. The same is ordered dismissed. The Appellant to continue serving his sentence as imposed by the trial court.

It is so ordered.

Dated and Delivered at Machakos this 2nd day of **October, 2018**.

D.K. KEMEI

JUDGE

In the Presence of:-

Daniel Nthenge Kingeli - the Appellant

Machogu - for the State

Josephine - Court Assistant