



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL CASE NO.140 OF 2015

BAKARI JUMAAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Being mitigation against sentence meted upon the appellant by the learned trial magistrate Hon. I Ruguru. Ag Senor Resident Magistrate)

JUDGMENT

The appellant, BAKARI JUMA was charged with preparation to commit a felony contrary to section 308 (2) of the penal code.

The particulars were that;

“On the 19th October,2014 at Dudus area in Likoni sub- County of Mombasa county, the appellant not being at his place of abode had with him an article for use in the course of or in connection with burglary namely a panga”.

On 21st October,2014, the appellant appeared before the magistrate’s court where he pleaded guilty to the charge but the facts could not be stated to him because the exhibits was not in court. The matter was deferred to 22.10.2014 for mention for purposes of facts being stated.

On 22nd Otober, 2014, the appellant once again appeared before court and facts were stated to him, whereby he responded in Kiswahili language.

“Maelezo ni ya ukweli” (translated in English language to mean “the facts are true”)

A plea of guilty was entered against the accused person who was subsequently convicted on his own plea of guilty.

The prosecution indicated that the appellant be tried as a 1st offender. He mitigated and asked for mercy and forgiveness of the court.

The Hon. Magistrate, then proceeded to refer the case for community service orders on 28th October, 2014, the community service orders officer, Mr Kioko presented the community service order in respect of the appellant to court.

The community service order report on accused was unfavorable in that he was not found suitable for non

custodial sentence since he had two previous convictions, one of which was similar to the one he was facing.

The Honourable magistrate, in considering the nature of the offence, its gravity and circumstances surrounding its commission, coupled with the accused person's record as brought out by the community service orders officer, sentenced the appellant to serve ten (10) years imprisonment.

The appellant filed mitigation grounds of appeal against the sentence that was meted out against him as follows;

- 1 that he is remorseful;
- 2 that he begs for leniency;
- 3 that he is a 1st offender and a layman in law;
- 4 That he has ulcers.

He prayed that the court considers these grounds and quash the sentence so he could join his family.

The appellant filed written submission in which he stated that he was not arguing against the conviction but the sentence. He explained the circumstances under which he was arrested and pleaded for leniency. He also stated that his family had been subjected to poverty and his health compromised by his incarceration. He promised never to repeat what he did.

In their oral submissions, the state, through M/s Mutua, the learned state counsel, submitted that they were opposed to the appeal against sentence by the appellant. She pointed out that the appellant pleaded guilty to the offence and was found to be a third offender. She also pointed out that the offence of "Preparing to commit a felony" attracts a sentence of 15 years and therefore the court was lenient to him considering he was not a 1st offender. She further submitted that the appellant cannot plead ignorance of the law as this goes against the principle of "ignorance of the law is not defence".

And for his poor health, M/s Mutua submitted that he would be managed at the Shimo la Tewa health facilities.

In considering the appeal by the appellant, I wish point out that the appellant was charged with the offence of ;

"Preparation to commit a felony contrary to section 308(1) of the penal code."

This section provides as follows;

"Any person found armed with any dangerous weapon or offensive weapon in the circumstances that indicate that he was so armed with the 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 was sentenced to serve ten (10) years imprisonment which sentence is within the period prescribed by the law.

I therefore find that there is nothing unlawful or irregular about the sentence that was imposed against the appellant.

The High court will only interfere where there was a failure of justice in sentencing in the lower court by an unlawful sentence having been meted against the appellant, which when the law is considered, is out rightly wrong and illegal.

I have perused the record and find that the magistrate considered all the factors surrounding the case, took into account the appellant's mitigation and records, and referred the case to the probation officer for a social inquiry in an attempt to place him on a community service order programme. The probation officer's report was unfavourable in that it brought out the accused person as a habitual offender with previous convictions, one of similar nature to the one which he was charged with in the instant case. I can only find that the magistrate was influenced by all these in handing out the sentence against the appellant.

I have considered the submission by the appellant and find that he has raised issues which he ought to have raised before the lower court in mitigation. However, he is basically seeking for leniency and a remission of the sentence that was imposed against him.

Matters of mercy and leniency by convicts are matters this Honourable court is not privy to. The only institution with the capacity to validate such claims is the Prisons Authority, which has the mandate to recommend this to the advisory committee on the mercy for the President to exercise his power as established by Article 133 of the Constitution, 2010.

It is so ordered, and the appeal dismissed.

Judgment delivered, dated and signed this 18th January, 2017.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/s Ocholla for the state

Appellant in person

C/clerk- Constance