



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL APPEAL NO. 139 OF 2015

HUSSEIN GUNI BENZAMEAPPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal from the original sentence in Criminal case No.128 of 2011, Chief Magistrate court in Mombasa).

JUDGMENT

The appellant, HUSSEIN GUNI BENZAME was charged with the offence of preparation to commit a felony contrary to section 308 (2) of the Penal Code.

The particulars were that;

“On 23rd day of December, 2013 at Soko Mjinga area in Kisauni sub-county within Mombasa County, the appellant not being at his place of abode had with him an article for use in the connection with burglary namely a metal bar”.

The appellant pleaded guilty to the said charge and was convicted on his own plea of guilty whereby he was sentenced to serve seven (7) years imprisonment.

Being aggrieved with the said conviction and sentence, the appellant filed a petition of appeal dated 20th of July 2015. He, however, sought leave to amend the same and filed memorandum grounds of mitigation, whereby he abandoned the appeal against his conviction and challenged the sentence that was imposed against him on the following grounds;

1. That he is too remorseful;
2. That he begs the court for leniency despite the offence;
3. That he is a first offender and a layman in law;
4. That he suffers from gastro infection” ulcers” and delapidaly (heart problem)

His prayer to court is that the sentence be quashed or reduced to enable him join his family. The appellant filed written submissions in which he submitted on the mitigating grounds of appeal and pleaded with this court to have mercy on him.

This was opposed by the learned counsel for the state M/s Mutua, who noted that the appellant was sentenced to serve 7 years imprisonment after he pleaded guilty to the offence of preparing to commit a felony contrary to section 308 (2) of the Penal Code, his records and mitigation considered. She submitted that under section 308 (2) of the Penal Code, the offence attracts a sentence of not less than 7 years and not more than 15 years, meaning the trial magistrate was lenient by awarding the appellant the minimum sentence.

I have considered the mitigating grounds of appeal and submissions by the appellant herein. I find that what the appellant seeks to benefit from is parole by pleading for this court's mercy and leniency.

The records clearly show that the Honorable magistrate considered all the factors surrounding the case together with appellant's record and mitigation statements before passing the sentence against him. The sentence that was meted against the appellant was the minimum sentence provided for under the section of the law he was charged and convicted.

The High court can only interfere where it is demonstrated that there was failure of justice by the trial magistrate meting out an unlawful sentence against the appellant. It is now trite law that where a statutory sentence is provided for, this court has no discretion but to give effect to the law.

I have anxiously by considered his submissions and note that the appellant's main reason for seeking to have the sentence that was meted against him either reduced or quashed is because he is remorseful, sick and with a family, hence wants further leniency and mercy of the court.

There are matters this Honourable court is not privy to as they were not canvassed during the trial. And, the only institute with the capacity to validate these claims is the Prison's Authority which can use them to recommend to the Advisory Committee on the Power of Mercy for the president to exercise his powers of mercy under Article 133 of the Constitution, 2010. This honourable court is "functus officio" in so far as such matter are concerned.

It s so ordered.

Judgment delivered, signed and dated this 1st day of March, 2017.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/s Ocholla for the state

The appellant in person

C/clerk- Kiarie