



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**HIGH COURT CRIMINAL APPEAL NO. 280 OF 2012**

**FREDRICK MURIITHI MUGENDI.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

***(Being an appeal from the judgment of the Hon. B. N. Nzakyo (Senior Resident Magistrate)***

***in***

***Githunguri Principal Magistrate's Criminal Case No.1082 of 2011 delivered on***

***2<sup>nd</sup> November, 2012)***

**JUDGEMENT**

Fredrick Muriithi Mugendi was charged with preparation to commit a felony contrary to section 308 (3) (b) of the Penal Code. It was alleged that on the 28<sup>th</sup> day of August 2011 at 3 a.m. at Diplomat House in Githunguri Township in Kiambu County within Central Province was found in a building namely a dwelling house of Winfred MainaWanjiru at night with intent to commit a felony there in.He was found guilty convicted and sentenced to pay a fine of Kshs.100,000/- in default serve five years imprisonment. He was unable to raise the fine and since the date of the sentence, that is 2<sup>nd</sup> November 2012, has been serving his imprisonment term.

Under grounds of appeal filed on the 9<sup>th</sup> of November 2012 he appealed both against the conviction and sentence. But at the hearing of the appeal he submitted that he shall only be appealing against the sentence. He submitted that he has served three years and during the period of imprisonment has trained and attained a grade I both in carpentry and upholstery. He also stated that his mother died while he was in prison and that he is a married man with two children who are currently taken care of by his aunt because his wife is jobless.

Learned state counsel M/s Nyaicho, submitted that although the appellant was sentenced to five years imprisonment he appeared remorseful and since he had served a substantial part of it she did not oppose the appeal.

Having heard the respective submissions and having noted that the appellant does not dispute the length

of the sentence it is my view that it would serve more good than harm if the appellant were set free so that he can go and engage in gainful employment. However, it is important to note that under section 304 (3) (b) of the Penal Code any person who is convicted for the offence of preparations to commit a felony upon conviction is liable to imprisonment with hard labour for five years and if he has previously been convicted of a felony relating to property to such imprisonment for 10 years. The learned trial magistrate having chosen the path to impose a penalty of a fine ought to have been guided by Section 28 of the Penal Code. The fine imposed was that of Kshs.100,000/- (One Hundred Thousand), which was subject to Section 28 (2). Hence, the default term ought not to have exceeded 12 months imprisonment. In that respect, it follows that the sentence imposed was illegal. The appellant ought to be set free forthwith having already served in excess of the 12 months.

The upshot of my observation is that this appeal succeeds and the appellant is forthwith set free.

**DATED and DELIVERD at NAIROBI this 8<sup>th</sup> day of June 2015.**

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the Presence of:**

1. The appellant in person.
2. M/s Nyauncho, for the respondent.