



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. 13 OF 2013

JAMES KITHUKA KIMEU APPLICANT

VERSUS

REPUBLIC

R U L I N G

1. The Applicant, **James Kithuka Kimeu**, had filed a **Criminal Appeal No. H.C.CR.A 240/2008** on 25/4/13. The Appellant withdrew the appeal and on 19/6/2013 filed an application for the review of the sentence under **Article 50 (2) (q)** of the **Constitution**.

2. According to the affidavit in support of the application, the Appellant was convicted for the offence of preparation to commit a felony and sentenced to 14 years imprisonment. The Applicant averred that the trial court did not take into account the period the Applicant had been in confinement since the date of his arrest. The Applicant termed the sentence as harsh and excessive.

3. I have perused the lower court record. The plea was taken on 21/7/04 for the retrial. The date of the offence is reflected as 29/5/2000. Although the record of the initial trial does not form part of the proceedings herein, there is no doubt that the Applicant was in custody since the offence charged was robbery with violence contrary to **section 296 (2)** of the **Criminal Procedure Code** which was not bailable then. In accordance with **section 179 (2)** of the **Criminal Procedure Code** the Applicant was sentenced to 14 fourteen (14) years imprisonment on 25/3/08 for the lesser charge of preparation to commit a felony contrary to **section 309 (1)** of the **Criminal Procedure Code**.

4. The Applicant's application is for this court to review the sentence under **Article 50 (2) (q)** of the **Constitution** which provides as follows:-

“if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”

5. Under **section 362** and **364** of the **Criminal Procedure Code**:-

362.

“ The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

364.

In the case of proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may –

- a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
 - b. in the case of any other order other than an order of acquittal, alter or reverse the order.
2. No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence;

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

3. Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
4. Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
5. When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceedings by way of revision shall be entertained at the insistence of the party who could have appealed.”

6. I have perused the lower court record. I have not seen any irregularity. The sentence provided for under **section 308 (1)** of the **Penal Code** is not less than seven (7) years and not more than fifteen (15) years. The sentence is therefore within the law.

7. The proviso to **section 333 (2)** makes it mandatory that the period spent in custody be taken into account. The words used in the said proviso is that “**the sentence shall take account of the period spent in custody**”.

8. By the date the sentence was meted out on 25/3/2008, the Applicant had been in custody for about eight years. The record reflects that the arrest of the Applicant was effected in the year 2000. Even taking into account the maximum sentence under **section 308 (1) of the Penal Code**, the Applicant ought to have been sentenced to not more than seven years imprisonment. Consequently, I revise the sentence of fourteen (14) years and substitute it with seven (7) years.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 13th day of November, 2014.

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JUDGE