



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 28 OF 2012

A.K.K APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal arising from the Judgment of Hon. M. Kasera (Principal Magistrate) in Eldama Ravine Principal Magistrate's Court Criminal Case No. 1141 of 2011 delivered on 30th January, 2012)

JUDGMENT

The Appellant, A.K.K was jointly charged with I.N.M with the offence of preparation to commit a felony contrary to Section 308 (2) of the Penal Code.

Particulars are that the 1st day of December, 2011 at Mogotio District within Baringo County, jointly not being at his place of abode, had with them articles for use in the course of, or in connection with burglary namely metal object used for breaking and two master keys.

Plea was first taken on 2nd December, 2011 when both the Appellant and the second accused pleaded not guilty. On 27th January, 2012, the Appellant informed court that he wanted to change his plea. Charge was read to him as well as the facts to which he pleaded guilty. He was accordingly convicted on his own plea of guilty and sentenced to five (5) years imprisonment without the option of a fine.

By a Petition of Appeal filed in court on 14th February, 2012 he raised four main grounds of appeal, mainly:-

- 1. That the trial magistrate erred in both law and fact when he failed to consider that the Appellant was a first offender when passing the sentence.**
- 2. That trial Magistrate failed to consider the Appellant's mitigation that he was both a HIV and TB victim and the only bread winner of his family of four children.**
- 3. That the sentence of five years imprisonment was manifestly harsh and excessive given**

the fact that the Appellant would not access fair treatment while in Prison.

4. That trial court erred both in law and fact when it erroneously failed to consider the Appellant's defence without giving reasons as provided by section 169 (1) of the CPC yet the same was remarkably comprehensive as to casting considerable doubts in the strength of the prosecution case.

The appeal was canvassed before my brother Hon. Justice Ochieng on 18th April, 2013. He then called for a pre-sentence probation officer's report and fixed the matter for mention on 23rd April, 2013 to confirm that this report had been filed in court. On this date, I was handling criminal matters and so the file was placed before me. I then notified the Appellant that the Judgment should be written by the Judge who heard the appeal and that the said Judge was handling Election Petition matters at Mombasa. I asked him if he had any objection with myself writing the judgment in the circumstances to which he responded that he had no objection.

During the hearing of the appeal, he informed court that he was only appealing against the sentence. He pleaded for leniency stating that he was unwell and was suffering from H.I.V. It is noted on record that the Honourable Judge saw a copy of the original medical report which confirmed that indeed the Appellant was H.I.V positive.

I have read the Probation Officer's Report that is undated but received in court on 23rd May, 2013. The same is favourable to the Appellant. It confirms that the Appellant is on treatment for H.I.V and Tuberculosis. That the Appellant's wife and their little child are also suffering from H.I.V and require the Appellant's moral and emotional support. It also states that the family and community are willing to receive the Appellant back into the community and recommends for a non-custodial sentence.

The Appellant was charged under Section 308 (2) of the Penal Code. The penalty for the offence of preparation to commit a felony is prescribed under sub-section (4) of the same section which is up to five (5) years imprisonment, and where a person has previously been convicted of a felony relating to property to such imprisonment for ten (10) years.

From the record of the lower court, the Appellant was a first offender and so the trial court gave the maximum penalty provided by the law. I find this sentence to be punitive in that the trial court failed to take into account that the Appellant was a first offender and did not waste court's time having been convicted on his own plea of guilty. The trial court also failed to take into account the mitigation the Appellant offered.

He had pleaded with the court for leniency stating that he was on medication for H.I.V and was a first born in his family.

Therefore, taking into account the circumstances of the case and the Appellant's mitigation and the favourable pre-sentence probation report, I do hereby allow the appeal in part, in favour of the Appellant. I set aside the sentence of five (5) years imprisonment and substitute it with one (1) year imprisonment. In tabulation of this period, the Appellant having been sentenced on 30th January, 2012 shows that he has already served the sentence.

I do accordingly order that he be hereby set free unless otherwise he is lawfully held.

It is so ordered.

DATED and DELIVERED at ELDORET this 9th day of July, 2013.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Appellant in person

Mr. Mulati for the State/Respondent