

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Revision 129 of 2006

Julius Kareithi Gichuru

Somoiiera Peter Mtenge.....APPLICANTS

Versus

Republic.....RESPONDENT

RULING

Julius Kareithi Gichuru and Somoiiera Peter Mtenge were jointly tried on a charge containing five counts. The first count is in respect of a charge of preparation to commit a felony contrary to section 308(2) of the Penal Code. Count 2 to 5 relate to the offence of being in possession of a firearm without a firearm certificate contrary to Section 4(2) (a) as reads with Section4(3) (a) of the Firearms Act Cap 114 Laws of Kenya.

After undergoing a full trial, Somoiiera Peter Mtenge was acquitted of all the five counts. Julius Kareithi Gichuru was acquitted on Count 1 but was convicted on counts 2-5 and sentenced to serve 18 months imprisonment one each count. The sentences were ordered to run concurrently.

In exercise of this court's supervisory jurisdiction, I called for the proceedings for my perusal. It became clear that the law prescribes a minimum sentence of 7 years and a Maximum of 15 years imprisonment for such offences. This court has the jurisdiction to correct the anomaly under Section 362 of the Criminal Procedure Code by altering the sentence to conform with the law.

In exercise of the powers conferred to this court under Section 364(2) of the Criminal Procedure Code I summoned the learned State Counsel and the prisoner to make representations before altering the sentence to the prejudice of the prisoner.

The prisoner, Julius Kareithi Gichuru, filed written submissions, which he used to argue his case before me. It is his submission that though he did not prefer an appeal against conviction nevertheless the evidence tendered by the prosecution did not establish his guilt. Mr Monda, learned State Counsel was of the contrary view that the prosecution established its case beyond reasonable doubt. Of course I take note of the fact that this is not an appeal. My intention in summoning the parties is to receive representations relating to the sentence. In view of that I will not belabour so much to consider as to whether or not the prosecution proved its case. In any case the prisoner did not see the need to appeal. The fact that he is required to be heard under Section 364(2) of the Criminal Procedure Code does not mean that he should use these proceedings to argue an appeal. That notwithstanding, I have perused the entire proceedings and I am convinced that the offences in counts 2 to 5 were established against the prisoner. The firearms were found in the pockets of the prisoner according to the evidence of P C Ashford Kinyua (P W 1), P C Mbaya Katana (P W 2) and Lawrence Nthiwa (P W 3).

The prisoner beseeched this court not to tamper with the sentences pronounced by the learned Senior Resident Magistrate because he is of poor health. The prisoner also urged this court to take into account the fact that he was in remand for a long time pending trial. It is the argument of the prisoner that a long prison term will not rehabilitate him.

Mr Monda learned State Counsel was of the view that the sentence should be altered to comply with the law set out under Section 4(3) (a) of the Firearms Act.

I have considered both the written and oral submissions tendered by the convict, Julius Kareithi Gichuru. I have also taken into account the submission of Mr Monda, the learned State Counsel. The discretion on sentence over the offences stated in counts II to V is limited, in that there is a minimum sentence set at 7 years and a maximum fixed at 15 years. The trial Resident Magistrate therefore erred when she pronounced a sentence below the minimum set by law. I am entitled to correct such an error in exercise of my revisionary powers. I have considered the mitigation made on appeal and the mitigation given before the trial court and I think the convict should serve a sentence of eight (8) years in prison. The end result is that the sentences of 18 months pronounced by learned Resident Magistrate are set aside and substituted with a sentence of 8 years imprisonment on each count with effect from the date of sentence. The sentences to run concurrently.

August 18, 2006

Sergon, J