



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 396 OF 2001

(From Original Conviction and Sentence in Criminal case No. 772 of 2001 of the Chief Magistrate's Court at Mombasa –F.N. Muchemi, CM)

HEZRON GITHUAAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGEMENT

On 1.3.2001 a charge sheet was presented to court with charges against the appellant and 8 other persons. The charges recorded were 7, 3 of which were robbery with violence contrary to section 296 (2) and 4 concerning "being in possession of firearms and ammunition without certificate contrary to section 2 a (1) Firearms Act Cap 144. On 21.5.2001 the original charge sheet was again amended. On 25.6.2001 a Nolle Prosequi was entered against 2nd 3rd 5th 8th 9th and 7th accused person.

This left on charge 3 1st accused (appellant) Hezron Githua 4th accused Nancy wambui 6th accused Geoffrey Miringu. On 11.7.2001 the charge sheet was substituted and amended, by this time only the appellant and one Geoffrey Miringu were remaining on charge sheet (as accused 1 and 2). They were facing 8 counts and an alternative count of handling stolen goods.

On 11.7.2001 the new charges were read out to the accused. The next step is that Mr. Magolo said he did not wish to recall any witnesses and the prosecution closed its case without calling any further evidence. It had already called 20 witnesses. The court on a ruling acquitted both the accused on robbery with violence charges. By now only the appellant was still in the case on counts 5, 6, 7 and 8 and 9. The court found that he had a case to answer in those charges. He gave sworn evidence. He said that at 2.00 p.m. on 16.2.2001 some persons entered pointing a gun at him in his office at Makande estate. Some things were off loaded from a vehicle parked outside. These were cash boxes with other items. These people pushed the appellant into a small car and was driven away with 4 men. Before leaving he had seen a police car hovering around the estate.

The men in the small car dumped him out of the car near Kenya Breweries depot in Shimanzi. Walking towards his house he entered the clinic of Dr.Miringu and he was treated. He was advised to lie in the clinic for sometime and he woke up at 8.00 p.m. At this time 8.00 p.m. he wanted to report the incident to the police. He went to Mr. Ndere's home in Mikindani to ask him to escort him to the police station to report. Ndere was not at home then but he came in later. Ndere advised the appellant to get a

lawyer to escort him. He went to Mbote's house who telephoned Kanyi Advocate. The advocate advised that they go to the police in the morning. This they did and the incident was reported to Urban police station on the morning of 17.2.2001. The police went to the Makande estate and into the house of the appellant where the 3 cash boxes were found and other items. The appellant denied that the guns were found in his house. Later appellant found that his wife and his friends were arrested. The record shows that he was arrested on 17.2.2001 and upto date he never went to sleep in his house but has been residing in the premises of the Government. The record shows also that as from 5.00 p.m. on 16.2.2001 the police kept guard at his house at Makande until the following morning when the appellant was brought to the house by police and his house, yard and office were searched in his presence. During this period no one was seen entering the port. He denied that any guns were found in his house but admitted that some 3 cash boxes and other items not named by him were found in his office. He said he saw the guns for the first time in court. However there was evidence that 2 guns and ammunition were found in his possession. In his sworn statement he admitted that after the incident in his office on 16.2.2001 he went to the clinic of Mr. Miringu for treatment where he stayed until 8 p.m. after which he left to visit the home of Ndere his friend, who took him to the house of Mbote where he slept the night out and his advocate took him from there on 17.2.2001 to Urban police station.

The prosecution's evidence on the issue of guns and ammunition is that one gun G3 serial No. 005212 was recovered from the abandoned matatu KAE 937K and handed over to OCS Makupa police station for safe keeping. This was the gun stolen from the murdered police officer. In the flat of appellant they found two guns (1) SMG rifle serial H.51773932 (2) MP5 rifle serial 7612489 both loaded with ammunition. Also an AK 47 rifle No. 80 x 26122 was recovered at the African bar where some suspects had a confrontation with police. The suspects were killed. Thus of the 4 guns recovered 2 were found in the premises occupied by the appellant.

The trial magistrate found the evidence on the recovery of the guns was truthful and reliable. This court has perused this evidence again and I am convinced that the trial magistrate was right intrusting and relying on the prosecution evidence in this regard.

On the issue of cash boxes the appellant states they were found in his premises. There is evidence that they were marked "KCB" and one was interfered with. It is quite clear that the appellant knew these items were stolen. The trial magistrate did consider the evidence of the defence and found it unbelievable.

This court finds the story was a cover up to make things appear truthful. No doubt the appellant went to the clinic of Miringu but only to hide until darkness. He did not go to his house for fear he could have been arrested (he had already said that he had seen a police car hovering around the estate earlier in the day). It must be concluded that he visited his friends to seek refuge at night.

Now looking at the grounds of appeal grounds 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 the court is of the view that prosecution of accused's case is in the hands of the prosecution. It is for the prosecutor to produce whatever evidence he may consider relevant. In this case the prosecution evidence on several counts was found unsatisfactory by the learned magistrate who threw those charges out and acquitted the appellant of robbery with violence charges.

On grounds 8 the Attorney General has absolute power to direct prosecution of criminal cases he may discontinue any criminal case against anyone. The High Court has power indeed to examine the manner in which the Attorney General exercises his powers of prosecution and would invalidate the same if they were shown to have been exercised contrary to law. In this case there is no allegation that nolle prosqui was entered contrary to provisions of law. See the case HCC Criminal Application No. 39 of 2000 Njogi v. Attorney General (UR). Regarding the ground on amendments of the charge it is not shown that the police did not prejudice the appellant who was represented by advocate. No objection was raised that the amendments would prejudice the appellant. Of grounds 12, 13, 14 and 15. This court has examined the appellant's defence above and has come to the conclusion that the statement was a cover up and therefore not reliable.

Regarding ground 16 the failure of signatures on the inventory is not fatal to the case and it was not

raised in the lower court.

Finally on the sentences the decision as to what sentence is suitable is in the discretion of trial magistrate. The appellate court will only interfere where the sentence is excessive or harsh in the circumstances of the case. This court is not persuaded that the sentences here are excessive or harsh.

For the above reasons I find the grounds of appeal without merit. The appeal is therefore dismissed.

Dated this 3rd day of June 2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE