REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

Criminal Appeal 222 of 2006

JULIUS KAREITHI GICHURU ……..…….…… APPELLANT

AND

REPUBLIC ……...……. RESPONDENT

(Appeal from a revision order of the High Court of Kenya Mombasa (Sergon, J) dated 18th August, 2006 in H.C. Cr. Revision No. 129 of 2006)

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JUDGMENT OF THE COURT:

The appellant in this appeal, *Julius Kareithi Gichuru*, was, together with one Somooireta Peter Mtenge, charged with one offence of preparation to commit a felony contrary to *section 308(2)* of the Penal Code and four other counts each of being in possession of a firearm without a firearm certificate contrary to *section 4(2) (a)* as read with *section 4(3) (a)* of the *Firearms Act Chapter 114* Laws of Kenya. The particulars of the offences in counts 2 and 3 were the same in respect of time and place where the offences took place. The only difference that made the charges to be separated were the particulars and the make of firearms. In count 2, they were charged with being in possession of .38 special revolver with serial number erased, whereas in count 3 they were charged with being in possession of US Colt Pistol Serial No. 2365573. In count 4, they were charged with being in possession of four rounds of .38 mm calibre ammunition without a firearm certificate and in the last count they faced the charge of being in possession of five rounds of ammunition of unknown calibre without a firearm certificate. They pleaded not guilty to all the charges and the case proceeded to full hearing before the Resident Magistrate at Mombasa (R.N. Makungu). In a judgment dated 3rd November 2005, the court acquitted the appellant on the first count of preparation to commit a felony contrary to *section 308* of the Penal Code but convicted him on all the other four counts of being in possession of a firearm without a firearm certificate contrary to *section 4(2) (a)* as read with *section 4(3) (a)* of the same Act. The other accused (Mtenge) was found not guilty, acquitted of all the charges and released by the court.

After recording mitigation by the appellant, the court sentenced the appellant as follows:

"**Mitigation noted.**

Nevertheless, offence serious.

Accused sentenced to serve 18 months imprisonment for each count 2, 3, 4, 5 (sic). Sentence to run concurrently."

The appellant did not appeal against the conviction and sentence. He told us that he preferred to serve out that sentence because appeals take long to be heard and as the sentences he was awarded of 18 months in each count were to be served concurrently, it would mean being in prison for about 12 months if remission was granted which would be the same as waiting for one year for the appeal to be heard and finalized. However, his hope was dashed when about seven months into his prison term the superior court called up his file for revision of the sentence.

On 27th June 2006, the record shows that the superior court, in the exercise of its powers under ***section 362*** of the Criminal Procedure Code, called up the subordinate Court's record for revision in High Court Criminal Revision Case No. 129 of 2006. On that day, the appellant and the State Counsel appeared before the superior court for hearing the matter under revision. After the application for adjournment by both parties, the hearing proper proceeded on 28th June 2006. The main reason for seeking revision was that the sentence awarded by the subordinate court of 18 months imprisonment for each count of being in possession of a firearm without a firearm certificate contrary to ***section 4(2) (a)*** of the Firearms Act as read with **section 4(3) (a)** of the same Act was not legal as the correct sentence provided by the law was a minimum of seven (7) years imprisonment and a maximum of 15 years imprisonment. The learned Judge, after hearing both the State Counsel (Mr. Monda) and the appellant who submitted written submissions and also made oral submissions, set aside the sentence of 18 months awarded by the subordinate court and instead ordered the appellant to serve 8 years imprisonment. In doing so, the learned Judge stated, *inter alia*, as follows:

"**I have considered both the written and oral submissions tendered by the convict, Julius Kareithi Gichuru. I have also taken into account the submissions of Mr. Monda, the learned State Counsel. The discretion on sentence over the offences stated in counts II to IV is limited, in that there is a minimum sentence at 7 years and a maximum fixed at 15 years. The trial Magistrate 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 sentence of 18 months pronounced by the learned Resident Magistrate are set (sic) aside and substituted with a sentence of 8 years imprisonment in each count with effect from the date of sentence. The sentences to run concurrently."**

That is the decision which triggered this appeal. The appellant in his memorandum of appeal and in his address to us emphasized that he had been released under Presidential amnesty and he should not have had his sentence enhanced as he had served it. He also stated that the learned Magistrate erred in convicting him and although he did not appeal to the superior court against his conviction, this Court should revisit the subordinate court's record and decide on the merit or otherwise of the case that was brought against him and on the basis of which he was convicted. The state on the other had supported the enhancement, arguing that the sentence awarded by the subordinate court was illegal and needed correction.

We have perused the entire record, the case that was before the trial Magistrate and the proceedings and sentence on revision by the learned Judge of the superior court.

It had been reported to the police that a person had fired in the air during a quarrel. The police laid an ambush at the stadium near Kenya Commercial Bank and later intercepted the appellant together with his colleague who was acquitted. When the appellant was searched, two guns and ammunition were found in his possession. One gun was a US colt with five rounds of ammunition and the other was a revolver with four rounds of ammunition. The appellant and his colleague were arrested and later charged with the offences. The decision of the learned trial Magistrate was based on cogent evidence and it is no wonder that the appellant did not appeal against it. We are not sitting on an appeal against that decision but even if we were, we would see no reason to interfere with it. The sentence provided under ***section 4(3) (a)*** of the Amended Firearms Act is a minimum of 7 years and a maximum of 15 years. This came into being

after the section was amended in 1993, well before the appellant was arraigned in court on the offences under ***section 4(2) (a)*** as read with ***section 4(3) (a)*** of the Firearms Act. The learned trial Magistrate was therefore clearly in error in sentencing the appellant to a sentence below the minimum prescribed by law. That sentence was in law illegal. To correct such anomaly, ***section 362*** provides as follows:

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

The learned Judge of the superior court exercised his powers under that provision of law and he was entitled to do so. We also note that having detected the illegality of the sentence in this case, he proceeded under ***section 364(2)*** and ensured that the appellant appeared before him and was afforded an opportunity to submit on his own behalf as his interests were at stake and it was only after hearing the appellant and reading his written submission, and hearing the State Counsel that the learned Judge made the order enhancing the sentence. We have no reason to fault that procedure adopted by the learned Judge.

As to sentence, when one considers that the appellant had two guns in his possession, each with several rounds of ammunition, a sentence of 8 years reflecting only one year above the minimum provided by the law, and several years below the maximum cannot be treated as excessive in the circumstances of this case.

The appellant says he had served out his sentence. That cannot be true. He was sentenced to serve 18 months imprisonment on 3rd November 2005. Proceedings for revision started in June 2006, less than one year later. He could not have served out his sentence. In any case, there was no evidence before us that he had been released from prison either after serving out his sentence or under Presidential amnesty by the time the sentence was enhanced. Nothing turns on that allegation.

In conclusion, we are not persuaded that the decision of the superior court should be interfered with. We have no reason to do so as it was based on sound legal principles. In the result, this appeal is dismissed.

Dated and delivered at Mombasa this 22nd day of July, 2007.

J.E. GICHERU

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CHIEF JUSTICE

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR