IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

MISC. CRIMINAL CASE NO. 41 OF 2009

BETWEEN

CLEMENT JIMMY KHONJE …… APPELLANT

AND

THE REPUBLIC ……..…..…… RESPONDENT

CORAM	**:**	**HON. JUSTICE MZIKAMANDA**
	:	Kadzakumanja, Counsel for the Applicant
	:	……., Counsel for the Respondents
	:	Ms Mthunzi, Court Reporter
	:	Mrs. Munyenyembe, Court Interpreter

JUDGMENT

MZIKAMANDA, J.

This is an appeal by Clement Jimmy Khonje against the decision of the Senior Resident Magistrate sitting at Lilongwe. The appeal is against both conviction and sentence.

The appellant was jointly charged with three others for what was described as armed robbery contrary to Section 301 of the Penal Code. The four accused pleaded not guilty. After full trial the three others were acquitted on the charge while the Appellant was found guilty, convicted and sentenced to 9 years imprisonment with hard labour.

There are four grounds of appeal namely, that:

1. The Learned Magistrate erred in law in amending the Charge Sheet in that such amendment had occasioned a failure of justice.
2. The Learned Magistrate erred in law in convicting the Appellant in that there was no evidence to support the conviction.
3. The Learned Magistrate failed to give sufficient consideration to the Appellant's health when she imposed a sentence of 9 years imprisonment with hard labour.
4. In all circumstances of the case the sentence of 9 years imprisonment with hard labour was manifestly excessive.

On the basis of these grounds, the Appellant seeks that the judgment of the learned magistrate be set aside and the conviction be quashed or the sentence be set aside and a proper sentence be imposed.

At the hearing of the appeal the State did not attend despite due service.

On the first ground of appeal it was argued that when the Appellant first appeared before the magistrate the Charge Sheet indicated that the Appellant was armed

with an AK 47 rifle which was used in the alleged robbery. In evidence the prosecution brought a greener type of rifle which was different from the one indicated on the Charge Sheet. The State did not apply to amend the Charge Sheet to reflect Greener type of rifle until it closed its case. The Magistrate then took it upon herself to amend the AK 47 to read Greener Type of rifle. According to counsel, the State had failed to prove an essential element when it tendered a rifle different from the one indicated on the Charge Sheet. It was argued that the powers vested in the Court under Section 151 (2) of the Criminal Procedure and Evidence Code to order the alteration of a charge would require that a magistrate cautions himself or herself to ensure that the amendment is made without causing injustice. In the present case the court fell into error which cannot be cured by Section 5 of the Criminal Procedure and Evidence Code. The judgment should be set aside in view of the irregularity.

As to the 2nd ground of appeal counsel argued that PW 1 and PW 2 who had been at the scene of crime failed to identify the Appellant. They did not identify the military attire brought in evidence. Again the court failed to give adequate consideration to the evidence of DW 2 who was the Appellant's wife. The Appellant's wife told the court how the bag containing the rifle was found in the Appellant"s house, as having been brought by a cousin named Frank at the time the Appellant was away to a drinking joint. She led to the house of Frank where the police arrested Frank's wife. It was argued that in terms of the proviso to Section 118 of the Criminal Procedure and Evidence Code the court should look at the evidence of both the prosecution and the defence. Any doubt in the prosecution evidence should have been resolved in favour of the Appellant.

Grounds 3 and 4 were argued together. It was argued that there were strong mitigating factors and the court should have considered other forms of sentence than custodial. The Appellant is HIV positive and on treatment, a factor which the court should have taken into account. It was argued that the sentence of 9 years imprisonment with hard labour is excessive.

When this case was set down before me it was clear to me that substantial parts of the court record were not on file. All efforts on my part to get the missing parts have proved futile. I am however able to appreciate the nature of the case before the lower court from the record on file.

The events leading up to the case here were that on 15th November, 2006 Mr. Kiran Malla, of Export Trading Company Limited in Lilongwe, cashed from the National Bank of Malawi, Lilongwe Branch, the sum of K5,000,000.00. He was travelling in a car with a driver driving it. At around 13.40 hours as the two drove along Admarc Road in Area 4 in the City of Lilongwe the car was stopped and attacked by four persons dressed in camouflage or military uniform and armed with a rifle and panga knives. The attack was so sudden and violent that the victim could not identify the assailants, but were able to identify the rifle used in the attack. The attackers broke glasses of the vehicle as evidenced by three pictures tendered in evidence. They stole all the K5,000,000.00 cash, a cell phone and the car keys. Having stolen the items the attackers then vanished. The matter was reported to police who quickly mounted investigations. Four people including the appellant were arrested in connection with the robbery. A rifle was recovered

from the house of the appellant and the victims identified it as the one that was used during the attack on them. The rifle is the key item that connected the appellant to the robbery. While admitting that the gun was found in a bag in his house he said the gun was brought to his house by Frank in the absence of the appellant but in the presence of his wife. During trial his wife was called as defence witness. The lower court rejected the defence evidence as not representing the truth. She found the case for the prosecution proved to the required standard. She found the appellant guilty, convicted him and sentenced him accordingly.

On the first ground of appeal it is recognized that under Section 151(2) of the Criminal Procedure and Evidence Code where at any stage of the trial before the court complies with Section 254, or calls on the accused for his defence it appears to the court that the charge is defective either in substance or form, the court may make such order for the alteration of the charge as it thinks necessary to make in the circumstances of the case, unless having regard to the merits of the case, such amendment cannot be made without injustice. In the case at hand the amendment that was made was to substitute AK 47 rifle with Greener rifle. The amendment was made before the court complied with Section 254 of the Criminal Procedure and evidence Code and before the Appellant gave his defence. It is evident that the victims identified the Greener rifle as the one that was used in attacking them, at the time they testified in court. There was no other rifle produced in evidence. Indeed the witnesses who identified the Greener rifle were vigorously cross-examined on the matter and the court remained convinced that they properly identified the Greener rifle. When the court amended AK 47 rifle to

read Greener rifle at the close of the case for the prosecution it did not introduce a new matter that was not in evidence. In fact it is my view that the amendment was made in order to fulfill the ends of justice and there was no prejudice to the appellant. In his defence the appellant had the opportunity to challenge the entire evidence including that relating to the Greener rifle found in his house and identified to have been used in the robbery in question. He cannot therefore be said to have been prejudiced by the amendment. The first ground of appeal is not made out.

The second ground of appeal is that there is no evidence to support the conviction. The argument that the two victims of the crime did not identify the appellant at the scene must be viewed in the light of the fact that the attach was sudden and violent even though it occurred in broad day light. What they were able to identify was a gun that was used in the attack. It is the same gun that was tendered in evidence. It is the same gun that was found in the house of the appellant. The Appellant and his lone witness allege that the gun was brought to their house by Frank, a cousin of the Appellant. They allege that it was brought to their house by Frank for safe-keeping as the said Frank had quarreled with his wife. They led the police to the house of Frank and Frank was not found. It was Frank's wife who was found and was arrested. The lower court did not accept the evidence of the two defence witnesses.

According to counsel for the defence the lower court did not consider the evidence of the defence but simply relied on the prosecution evidence. While it is true that the law requires that the court considers both the evidence of the

prosecution and the defence and while it is also the law that there is no duty on the part of an accused to prove his or her innocence, there is nothing to substantiate the argument that the lower court did not take into account the evidence of the defendant. Be that as it may this court finds the purported explanation by the appellant on how the same gun that was used in the robbery was within a short space of time found in the house of the appellant incredible and unbelievable. That explanation cannot possibly be true. I would myself reject that explanation. I am satisfied and find that the gun tendered in evidence connects the appellant to the robbery in a material way in all the circumstances of the case. There was ample evidence to connect the appellant to the robbery. I find no basis for interfering with the conviction by the lower court. The conviction is upheld.

Turning to the appeal against sentence, I would note that counsel cited the case of *Rep v Kholoviko (1996) ML"R 355* as authority for the proposition that the fact that the offence is so serious that only a custodial sentence can be justified, does not necessarily mean that the offender must be given a custodial sentence. Counsel did not go so far as arguing that in the present case there are so strong personal mitigating factors that the court should have imposed a non-custodial sentence. The lower court, it is argued should have taken into consideration the fact that the appellant is HIV positive. Counsel seeks that the sentence of 9 years imprisonment be set aside. Also cited in support was the case of *Rep v Kampingo and Others (1995) 2 MLR 754* where a sentence of 5 years imprisonment with hard labour for robbery was reduced to four years imprisonment with hard labour. I have examined the seriousness of the present case and all the circumstances. I

have also looked at other case authorities. In *Kondwani Justeni and Others v Rep. Criminal Appeal No. 39 of 2008* on a charge of robbery contrary to section 301 of the Penal Code involving the use of firearms this court reluctantly upheld a sentence of 48 months IHL, emphasizing that that sentence did not create precedent. In *Rep v Allan Chididi Confirmation Case No. 1266 of 1994* a sentence of 3½ years imprisonment with hard labour for robbery was enhanced to 8 years imprisonment with hard labour. In *Rep v Fanasan Paguza Vashiko Confirmation Case No. 435 of 1994*, a sentence of 4 years imprisonment with hard labour for robbery was enhanced to 9 years imprisonment with hard labour. In *Rep v Beziria Amidu & Others Confirmation Case No. 23 of 1993* a sentence for robbery was enhanced to 9 years imprisonment with hard labour from 5 years imprisonment with hard labour. In *Felix Chisakasa v Rep Criminal Appeal No. 100 of 2008* an appeal against a sentence of 7 years imprisonment with hard labour for aggravated robbery was dismissed with the court describing it as at the lower end of the usual sentences imposed for aggravated robbery. The present case where a firearm was used is an aggravated form of robbery. The sentence of 9 years imprisonment with hard labour is proper and is upheld.

This appeal fails in its entirety.

PRONOUNCED in open court this 23rd day of July, 2009 at Lilongwe.

R.R. Mzikamanda

JUDGE