

IN THE HIGH COURT OF TANZANIA

AT TABORA.

APPELLATE JURISDICTION

(Tabora Registry)

(DC) CRIMINAL APPEAL NO. 87 OF 2002

ORIGINAL ECONOMIC CASE NO. 6 OF 1996

OF THE DISTRICT COURT OF KAHAMA DISTRICT

AT KAHAMA.

BEFORE: C.F. KIPILIMBA, Esq; DISTRICT MAGISTRATE

JUMA s/o HAMADI .....APPELLANT

(Original Accused)

Versus

THE REPUBLIC .....RESPONDENT

(Original Prosecutor)

J U D G M E N T

27<sup>th</sup> June, 07 & 13th Aug.07

MUJULIZI, J.

The Appellant was convicted by the District Court of Kahama, on the offence of unlawful possession of a firearm c/s 13(1) of the Arms and Ammunitions Ordinance (Cap.223 R.E. 2002) read together with section 56(1) and 59(2) of the Economic and Organized Crime Control Act, No.13 of 1984. He was sentenced, on 20/8/2000, to serve a 20 years jail term. When the matter came up for hearing, the Republic represented by Mr. Mkoba learned State Attorney did not support the conviction.

After hearing the appeal, I allowed the appeal, quashed the conviction acquitted the Appellant, set aside the sentence and ordered for his immediate release on 27/6/2007 and reserved the reasons for later.

These are the reasons:

The Appellant, who appeared at the hearing, had filed an 8 grounds memorandum. However, in view of the stance taken by the Republic, I will not dwell into the merit of those grounds. Instead I will deal with the grounds set out by the Republic.

It was argued that; right from the beginning of the trial, the Appellant had expressed his lack of confidence in the trial Magistrate, but the said Magistrate did not excuse himself from presiding over the trial and proceeded to convict the Appellant. In the circumstances the Appellant was not accorded a fair trial.

Secondly, it was argued, the record does not show that; at the time of producing the Exhibits, P.1 and P.2 the Appellant was given opportunity to object to their production. This was crucial because, these exhibits were critical to the entire case. It was therefore crucial to show that justice was done in proving the serious charge with which the Appellant was faced.

Thirdly, the judgment of the trial court relied heavily on the evidence of the prosecution without according equal weight to the evidence given by the defence in a manner that amounted to wrong

shifting of the burden to the Appellant. For instance; at page 3 of the typed judgment, the trial Magistrate says:

***"Among the two stories the accused's story is not credible at all for two reasons;***

***First because that story has no evidence to support or corroborate it. Secondly the nature of the story itself is totally incredible"***

It is clear, argued the learned State Attorney that; the learned trial Magistrate had wrongly shifted the burden to the accused.

Further, the evidence on record show that the Appellant had, if it be true, only attempted to buy a gun and that he was arrested in the course of that transaction before it had been completed.

There could have been reasonable doubt in relation to the charged offence of unlawful possession as there could still have been more time to complete the process.

In my judgment the Republic is correct: in not supporting the conviction. Indeed I am in entire agreement with the submissions of the learned State Attorney.

In order for the offence of unlawful possession to stand, certain elements must be proved beyond reasonable doubt. Firstly that the

ect was found in the exclusive possession of the accused  
secondly that such possession was with a criminal intent.

this case the only evidence critical to this fact is that of  
Boniface Joseph. But his testimony was all hearsay and at  
e was an accomplice, and in both instances, his testimony  
not be admitted in evidence, let alone be used to sustain a  
ction.

At page 26 of the typed proceedings P.W.1 concludes his  
timony in the following words:

*"The gun was in polyster sack where I put some three  
pieces of firewood and the accused took that bag with the  
gun and we got out. Before the accused went far there  
came the police who ordered us to stop. The policemen  
came out from the second room of the house in which I  
had kept the gun both of us were ordered to sit down.  
Then came Mr. Misana and asked me what was wrong. The  
police started asking me as to what we were selling to each  
other. The accused said that there was only a radio. I told  
him that his gun was being stolen. After that the accused  
was handcuffed then they opened the bag and took away  
the three pieces of wood before they took the gun.*

***There was also a neighbour called Julag. After that the police took this accused together with the gun to the police station and I was left there.”***

***If shown I can identify the gun as it was a shotgun. This is the gun I was given by Misana to trap this accused.”***

In my judgment, that piece of evidence pokes more holes in the prosecution case. It creates a lot of possible explanations for the circumstances of the story as told. It does not conclude that the Appellant had taken possession of the gun when he was arrested. It does not show that any money had been passed on to P.W.1 by the Appellant to signify the alleged sale. But what is more the entire scheme could have been staged to frame the accused.

P.W.2 and P.W.3 both state that by the time they went to the scene, the Appellant and P.W.1 were seated with a sulphate bag on the ground. But both witnesses go further to state that the Appellant was with the bag. This is inconsistent with the logical pattern of the circumstances. If a party was holding a suspected object, he would instinctively drop it down upon sitting on command of the arresting officers. It is therefore not conclusive that the appellant was actually in possession of the bag by the time these two witnesses came to the scene.

P.W. IV: D/sgt. Fredy, categorically states that he is the one who laid the trap to catch the Appellant, who had made plans to steal

the gun. According to this witness; the Appellant was arrested immediately after P.W.1 bid him fare well. (page 31). But P.W.1 stated that they had stepped out of the house and were a few paces off when they were arrested.

These inconsistencies create a reasonable doubt which ought to be resolved to the benefit of the Appellant.

For all the above reasons, I allow the appeal, quash the conviction and instead acquit the Appellant of the charged offence of unlawful possession a firearm c/s 13(1) of the Arms and Ammunitions Ordinance (Cap. 223 R.E. 2002) read together with section 56(1) and 59(2) of the Economic and Organised Crime Control Act No. 13 of 1984.

Appeal was allowed.

  
A.K. MUJULIZI

JUDGE

13/8/2007

Judgment delivered in the presence of Mr. Mkoba, learned State Attorney for the Respondent Republic, absent the Appellant who has since been set at liberty.

  
A.K. MUJULIZI

JUDGE

13/8/2007