

IN THE HIGH COURT OF TANZANIA

AT TABORA

APPELLATE JURISDICTION

(Tabora Registry)

(HC) CRIMINAL APPEAL NO.125 OF 2005

ORIGINAL CRIMINAL CASE NO.9 OF 2002

OF THE DISTRICT COURT OF TABORADISTRICT

AT TABORA

BEFORE, P.A. LYIMO., RESIDENT MAGISTRATE

MRISHO S/O ATHUMANI.....APPELLANT

(Original Accused)

Versus

THE REPUBLIC.....RESPONDENT

(Original

Prosecutor)

JUDGMENT

11/8/2008 & 8/9/2008

KADURI. J.

Mrisho s/o Athumani, the appellant in this appeal was convicted after he was found guilty by the Resident Magistrate Court of, Tabora at Tabora of the offence of unauthorized Possession of fire arms C/SS 13 (1) and 31 of the firearms and

ammunition ordinance, Cap. 223 read together with paragraph 20 of the first schedule to and sections 56 (1) of the Economic and organised crime control Act, No.13 of 1984 as amended by Act No.10 of 1989.

The appellant's children who were charged with him were initially suspected of having stolen a TV deck. The traditional guards commonly known as Sungusungu enlisted THE HELP OF pw1, A TEN CELL LEADER OF Ng'ambo Street, Sikonge Road within the Municipality of Tabora.

The house of the appellant was searched but the TV deck was not found. The Sungusungu started looking for it around the compound of the house. They suspected a garden which was in the compound. They asked for a hoe and started digging where the garden was. The appellant was not around at the time. In presence was the 2nd accused who is the appellant's son who was under suspicion of having stolen the said TV deck. The digging yielded fruits as the Sungusungu unearthed a home made muzzle loading gun, which became the subject of the charge. The second and third accused told the Sungusungu that the gun belonged to their father, the appellant.

In his defence the appellant stated that the Sungusungu visited and searched his house for a stolen TV. Deck. He

refused to be arrested by them and instead sent someone to call the Police. The police officers arrived and put him under their custody. On 2/8/1999 the Sungusungu went to the Police Station with a muzzle loading gun. His wife and children were arrested and put under custody till 6/8/1999 when they were formerly charged in court in connection with the offence of being in unauthorised possession of the muzzle loading gun. He denied knowing who had put the gun where it was found.

The issue is whether the surrounding in which the gun was found were accessible to the appellant only and not to all and sundry so as to pin him down as the only person who could have buried it there. The second issue is on the search conducted by the Sungusungu.

The evidence is clear that the compound in question was accessible to any other person and not to the appellant only. The Sungusungu in deciding to dig around they went straight to the spot. There is no evidence to show that they had to dig several places before they found the spot where the gun was buried. This shows therefore that they knew where to dig. This raises the doubt whether they did not plant the exhibit P1. This doubt is to be resolved in the favour of the appellant.

In my study of the proceedings, I could not find a search warrant having been secured by the Sungusungu. Under the

Provisions of Section 38 (1) (a) a Police Officer in-charge of a Police Station has power to issue search warrant or authorize search where he is satisfied that there is reasonable ground for suspecting that there is in any building, vessel carriage, box receptacle or place anything with respect to which an offence has been committed.

However, under section 40 Criminal Procedure Act, a search warrant may be executed between the hours of sunrise and sunset unless by application of a police officer or other person to whom it is addressed, a court permits him to execute it at any hour.

According to PW2 Paulo s/o Luhamba, an Inspector of Schools living at Ng'ambo area within Tabora Municipality, Sungusungu woke him up on 2/9/1999 at 4.00 a.m. He accompanied them to the house of the appellant. The appellant's house was searched and nothing incriminating was found. That is when the Sungusungu started digging in the compound. Even if the Sungusungu had been executing a lawful search, which they were not, the time they chose to execute that right was not permitted by any court as it was conducted before sunrise, which requires court's permit.

I hereby quash the appellant's conviction. As the appellant has completed the term of imprisonment I make no further orders.



L.K.N. KADURI

JUDGE

8/9/2008

Judgment delivered this 8/9/2008 in the presence of Mr. Juma Masanja, - State Attorney and absence of the appellant.



L.K.N. KADURI

JUDGE

8/9/2008