**IN THE COURT OF APPEAL OF TANZANIA**
**AT IRINGA**

**(CORAM: NDIKA, J.A., WAMBALI, J.A. And SEHEL, J.A.)**

**CRIMINAL APPEAL NO. 258 OF 2019**

**PASCAL MWINUKA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the Decision of the High Court of Tanzania, Economic and Corruption Crimes Division, at Iringa)**

**(Matupa, J.)**

**Dated the 12th day of July, 2019**
**in**
**Economic Case No. 1 of 2017**

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## JUDGMENT OF THE COURT

21st April & 5th May, 2021

**WAMBALI, J.A.:**

The appellant, Pascal Mwinuka appeared before the High Court of Tanzania, Corruption and Economic Crimes Division at Iringa Sub-Registry where he faced two counts. In the first count the charge involved unlawful possession of Government Trophy contrary to section 86(1), (2) (c) (ii) & (3) of the Wildlife Conservation Act, No.5 of 2009 read together with Paragraph 14 of the First Schedule and sections 57(1) and 60 (2) of the Economic and Organized Crime Control Act [Cap 200 R. E. 2002] as amended by sections 13 (b) and 16 (a) of the Written Laws (Miscellaneous Amendments) Act, No.3 of 2016.

In the second count the charge involved unlawful possession of Government Trophy contrary to section 86(1) (2) (c) (ii) & (3) of the Wildlife Conservation Act, No.5 of 2009 as amended by section 59 (a) of the Written Laws (Miscellaneous Amendments) Act, No.3 of 2016 read together with Paragraph 14 of the First Schedule and sections 57(1) and 60(2) of the Economic and Organized Crime Control Act [Cap 200 R. E 2002] as amended by sections 13(b) and 16(a) of the Written Laws (Miscellaneous Amendments) Act, No.3 of 2016.

Equally important, it was alleged in the particulars of the first and second counts respectively that on 19th February, 2017 at Ibani area within Ludewa District in Njombe Region the appellant was found in possession of Government Trophies namely; one Leopard hide and one Mongoose hide valued respectively at USD 3500 which is equivalent to TZS. 7,676,585 and USD 60 which is equivalent to TZS. 131,598/6 both being the property of the Government of the United Republic of Tanzania without a permit from the Director of Wildlife.

The substance of the prosecution case was briefly to the effect that on 19th February, 2017 the appellant was arrested in possession of the Leopard and Mongoose hides (exhibit P1 and P2 respectively) after search was conducted in his house at Ibani area. It was firmly testified by the

prosecution witnesses that the search in the house of the appellant was legally conducted after PW1 got information from an informer that the appellant was suspected to be dealing with narcotic drugs (Bhang). The search was conducted in the presence of the appellant, PW1, PW2 (a neighbuor), PW4 and three other persons, namely; police officer DC Lwata, Boniface Siame (a ten cell leader) and Bora Mwinuka (a relative of the appellant) who however did not testify at the trial.

After the search the appellant was arrested and sent to Police Station Ludewa where he recorded his statement before he was arraigned in court on the charges alluded to above. Noteworthy, exhibits P1 and P2 were sent to PW3 who prepared a Trophy valuation certificate (exhibit P4) and indicated that the trophies had the value shown in the particulars to the charge stated above.

The allegation was strongly denied by the appellant, hence the trial commenced. To support its case, the prosecution marshalled the following witnesses; SSP Elisante Ulomi (PW1), Casto Mchilo (PW2), Paul Patrick Simango (PW3) and Haruna Mlumba Mtove (PW4) and tendered four exhibits, namely; one Leopard hide, one Mongoose hide, the record of search and trophy valuation certificate which were admitted as exhibits P1, P2, P3 and P4 respectively. It is not insignificant, we think, to point

out that the record of search (PF 91) to be referred herein as exhibit P4, comprised the record of search, search order and seizure certificate.

In his defence, the appellant who did not summon any witness, categorically denied to have been involved in the commission of the offence. He, indeed, emphasized that the said Government trophies namely, Mongoose hide was found in the middle of the backyard fence of the house he lived with his parents. He added that the Leopard hide was found in the room of the house which was rented by one Jacob Willa who was arrested by the police and interrogated, but he later escaped and he was surprised that he was thus arrested to answer the charges.

More importantly, the appellant contended that the search was conducted in his absence as by that time he had gone with police officers to the place where John Mhagama lived and on return he found other police officers had surrounded the house and the government trophies, namely; Leopard and Mongoose hides were spread in the backyard fence.

Nevertheless, at the conclusion of the trial, the learned trial High Court judge was fully satisfied that the appellant was properly and legally searched and that the Government trophies were found in his house. He, therefore, believed the prosecution evidence and found that the appellant's defence had not raised meaningful doubt to discredit the

prosecution story. In the event, the appellant was convicted on both counts as charged. Consequently, he was sentenced to pay a fine of TZS. 76,765,850 and TZS. 1,315,986 or in default to imprisonment for twenty years and ten years for the first and second counts respectively.

As it were, the appellant was seriously aggrieved, hence the instant appeal. Initially, the appellant through the services of his advocate lodged a Memorandum of Appeal comprising six grounds of appeal. However, at the hearing, Mr. Musa Mhagama the learned advocate who appeared to represent the appellant abandoned the second and sixth grounds of appeal. In this regard, it was agreed by the Court and counsel for the parties that the remaining grounds can be conveniently re-arranged and paraphrased as follows:-

1. *That the appellant was improperly committed by the subordinate court for trial before the High Court.*
2. *That the appellant's conviction was wrongly based on a search order and seizure certificate which was improperly conducted and procured.*
3. *That the chain of custody of the alleged seized trophies was not fully explained by the prosecution witnesses at the trial.*
4. *That the prosecution case was not proved beyond reasonable doubt.*

Submitting in support of the first ground of appeal, Mr. Mhagama's thrust of his argument was to the effect that the District Court of Ludewa (the Inquiry Court) did not comply with the provisions of Rule 8(3) of the Economic and Organized Crime Control (The Corruption and Economic Crimes Division) (Procedure) Rules, 2016, GN No.267 of 2016. In his submission, the learned Resident Magistrate did not properly address the appellant for his failure to reproduce the exact words stated in the said provision. Thus, it was submitted that the said irregularity rendered the entire committal proceedings null and void. To this end, Mr. Mhagama urged us to nullify the committal proceedings and the entire trial court's proceedings, and thereby direct the Inquiry Court to commit the appellant for trial afresh because the omission occasioned injustice.

However, when we prompted Mr. Mhagama on whether in view of the Inquiry Court proceedings in the record of appeal on a particular date his argument can be valid; he readily admitted that the problem was not on the full compliance with the whole provision, but partial compliance. In this regard, he argued that although the inquiry Resident Magistrate indicated that he addressed the appellant in terms of Rule 8(3) of GN. No. 267 of 2016, the apparent omission was his failure to record what the appellant stated with regard to whether he wished to say anything or reserved his defence as required by that provision. Nonetheless, Mr.

Mhagama still maintained his contention that the said omission rendered the entire committal proceedings a nullity. He therefore reiterated his earlier prayer to urge us nullify the respective proceedings.

In response to the appellant's counsel submission in the first ground of appeal, Ms. Rehema Mpagama assisted by Ms. Edna Mwangulumba, learned State Attorneys, who appeared for the respondent Republic, though they conceded to the existence of the omission, they strongly resisted the contention that the omission is fatal. Ms. Mpagama spiritedly argued that the omission to indicate what the appellant stated after he was addressed in terms of Rule 8(3) of GN. No.267 of 2016 is not fatal. In her submission, in the circumstances of this appeal, it cannot be conclusively found that the appellant was prejudiced, as at the trial he was afforded the right to say anything he wished in his defence and utilized that opportunity to defend himself against the charges. In the event, Ms. Mpagama urged us to find that the complaint in the first ground of appeal is unfounded.

On our part, having gone through the record of appeal, it is not disputed that though the Resident Magistrate who presided over committal proceedings indicated that he had addressed the appellant in terms of Rule 8(3) of GN. No.267 of 2016, he neither reproduced the exact

words stated therein nor recorded the response of the appellant after being so addressed.

The crucial issue for our determination at this point thus, is whether the omission is fatal. To begin with, we wish, for clarity to reproduce the provisions of Rule 8(3) of GN. No.267 of 2016 hereunder:-

> *"(3) After complying with the provisions of sub-rules (1) and (2), the magistrate shall address the accused person in the following words or words to the like effect:*
>
> *"You have now heard the substance of the evidence that the prosecution intends to call at your trial. You may either reserve your defence, which you are at liberty to do, or say anything which you may wish to say relevant to the information against you. Anything you say will be taken down and may be used in evidence at your trial".*

Our reading of the above reproduced provisions leads us to the observation that the respective magistrate conducting committal proceedings may either address the accused in the exact words stated therein or words to the like effect. More importantly, the respective magistrate must inform the accused the following: one, that he has heard the substance of the evidence which the prosecution intends to call at the trial. Two, that having heard the substance of the evidence, he is at liberty to either reserve his defence or say anything he may wish to say relevant

to the information against him. Three, that if he opts to say anything, the same will be taken down and may be used in evidence at his trial.

On the other hand, although it is not exactly provided in that provision that the committing court must record the response of the accused on whether he reserves his defence, or opts to say anything, we think it is a good practice to indicate not only what the accused stated after being addressed by the Resident Magistrate, but also whether he said anything or opted to reserve his defence.

Moreover, in view of what is stated in the said provisions, it is also a good practice to indicate whether the accused was addressed in the exact words or words to the like effect. In our view, instead of simply indicating that the accused has been addressed in terms of the said provisions or that the respective provisions has been complied with may not essentially indicate what actually transpired during committal proceedings on the particular date. Admittedly, compliance with the said provisions in full ensures that the accused has understood what transpired during the committal proceedings and what will be expected of him at the trial before the High Court.

Nevertheless, in the instant appeal, having carefully scrutinized the record of appeal, we are satisfied that the omission of the committing

magistrate to comply fully with the provisions of Rule 8(3) of GN. No.267 of 2016 did not occasion injustice to the appellant to the extent of rendering the entire proceedings being declared a nullity. We say so because; firstly, though it is not clear whether the appellant reserved his defence or said anything or nothing at the committal proceedings after he was addressed by the Resident Magistrate, as rightly submitted by Ms. Mpagama, he was afforded the right to defend himself against the charges at the trial. Secondly, according to the record of proceedings of that particular date (31/1/2019), the appellant was properly committed to the High Court for trial. Particularly, the record of appeal at page 12 indicates that in his committal order the Resident Magistrate addressed him in the exact words stated under Rule 8(4) of GN. No. 267 of 2016.

In the circumstances, we find that the first ground of appeal is unmerited and hereby dismiss it.

With regard to the second ground of appeal, Mr. Mhagama submitted that exhibit P3 is doubtful because it was improperly procured contrary to the provisions of section 38(1) of the Criminal Procedure Act, Cap 20 R. E 2002 (now R. E. 2019) (the CPA). Elaborating, he stated that it is not clear whether the prior authority issued by PW1 on what had to be searched at the appellant's house really included the alleged seized trophies (Leopard and Mongoose hides) or the narcotic drugs only as per

information from the informer. He also expressed doubts on the list of items which were later indicated in the certificate of seizure (exhibit P3) after the alleged search was conducted. In his view, the search order was filled after the search and not before the search was conducted. Mr. Mhagama explained that though PW1 testified during examination in chief that he went to search the appellant's house on allegation of being in possession of narcotic drugs (Bhang) as per the information from the informer, surprisingly, exhibit P3 indicates that the authority to search was issued in respect of not only being in possession of Bhang, but also specifically "Ngozi ya Chui" (Leopard hide) and "Ngozi ya Nguchiro" (Mongoose hide). In this regard, Mr. Mhagama argued that if before PW1 went to search, the informer had told him that the appellant dealt with narcotic drugs, why he issued the authority to search government trophies which he was not informed and he had no idea that they existed in the appellant's house.

The learned advocate argued further that what was filled in exhibit P3 is contrary to PW1's evidence in chief that the search was intended to trace narcotic drugs (Bhang) which was not found, but the police team managed to get the government trophies indicated in that exhibit. Mr. Mhagama therefore, submitted that the inconsistency in the testimony of PW1 and the contents of exhibit P3 renders his credibility and the

authenticity of the said exhibit doubtful. Indeed, he submitted that mindful of the fact that in his defence the appellant complained that the search was not conducted in his presence, but he was only called to append his name and signature and that the independent witnesses were not there to witness, the trial judge would have taken the doubts raised seriously and resolved in favour of the appellant.

Moreover, Mr. Mhagama submitted that it was not explained at the trial by the prosecution why the other witnesses who allegedly participated and witnessed the search namely, G.5048 DC Lwata, a police officer and Boniface Siame (a ten cell leader and independent witness) and Bora Mwinuka did not appear to testify. In his opinion, non-appearance of the said witnesses at the trial casted doubt on whether the search was really conducted in their presence. He emphasized that as DC Lwata was the one who allegedly climbed the ceiling in the house to take the Leopard hide where it was allegedly hidden by the appellant he was bound to testify in support of the prosecution case.

In the circumstances, Mr. Mhagama invited us to find that PW1 and exhibit P3 cannot be held to be credible and that the search was not properly conducted as required by the law.

On her part, Ms. Mpagama spiritedly defended the finding of the trial judge that PW1 and other witnesses were credible and that the search was properly conducted. She therefore, argued that exhibit P3 was legally procured, tendered, admitted and relied in evidence to ground conviction of the appellant.

In her further submission, Ms. Mpagama submitted that PW1 stated categorically that he signed the authority to search the appellant's house at the police station Ludewa on 19th February, 2019 at 6.45 hours before he went to the respective place. She added that PW1 also testified that he filled the search order at 8.45 hours and later filled the seizure certificate outside the appellant's house after the search was conducted. To this end, she argued that the minor discrepancy to indicate that the items to be searched included; narcotic drugs and Leopard and Mongoose hides which were not mentioned by PW1 in his evidence in chief, is not a material contradiction to discredit the witness and the authenticity of exhibit P3. She therefore submitted that though the search was conducted under section 38 (1) of the CPA, in wildlife offences, the same has to be conducted in terms of section 106 (1) of the Wildlife Conservation Act, No.5 of 2009 (the WCA) in which the presence of an independent witness depends on the circumstances of each case.

Strongly placing reliance in her submission on the propriety of the search, Ms. Mpagama maintained that much as PW2 who was an independent witness signed exhibit P3 and testified to have witnessed the search, there was no need for DC Lwata and Boniface Siame to appear to testify at the trial as claimed by the appellant's counsel.

In the event, Ms. Mpagama urged us to dismiss the second ground of appeal for lacking merit.

Having heard the counsel for the parties' submissions and going thoroughly through the record of appeal, we note that the trial judge believed the evidence of PW1 and held him to be credible. Moreover, it is clear that he also found that the evidence of PW1 was fully supported by that of PW2 and PW4 on the propriety of search and the value of the seized trophies. However, on our part, we think that the contradiction in the evidence of PW1 and the contents of the search order and seizure certificate (exhibit P3) is material. We say so because, according to the testimony of PW1 during examination in chief, before he went to search the house of the appellant at Ibani Juu area, he had the tip from the informer that the suspicion was on the existence of narcotic drugs (Bhang) and thus, he filled in exhibit P3 to that effect and mobilized other police officers, namely, ASP Ngonyani (OCS), A/Inspector Mtove (OC-CID) and

DC Lwata to go to that place. Notably, during cross examination PW1 stated as follows concerning the filling of PF 91 (exhibit P3):-

> *"The PF 91 was filled out immediately after the search. The search was done from 7.00 – 8.45 hours. The form was filled out in two phases. In the first phase, I filled out things I suspected. In the second phase, I filled out the items I actually seized. I filled out the form at the crime scene.*
>
> *The suspected items were filled out after I got information. I filled out the items at the police station. That is why the suspected items are completely different from those I retrieved. I filled the form on the same day, but before I left office. On the form it shows that I filled the form on the 19th February at 06.45 hours.*
>
> *The form shows the things I suspected were (narcotic drugs) "Madawa ya kulevya (bhang) "ngozi ya chui", "ngozi ya nguchiro" are likely to be found in the house of the accused person."*

Admittedly, gauging from the reproduced version of PW1's testimony during cross examination, it sharply differs with what he stated during examination in chief, which is to the effect that an informer told him that the appellant was involved in narcotic drugs and thus he filled the form (exhibit P3) as per information. It is surprising, we think, why if the informer gave PW1 information concerning the suspicion of the appellant dealing with narcotic drugs and the said government trophies he could forget to state so in his evidence in chief. In this regard, we hold

the view that the contradiction in the testimony of PW1 is material. Indeed, it is a serious contradiction on the part of PW1 because while he stated that "the suspected items were filled after he got the information", in a turn of event, while still under cross examination he stated that since he filled out the items at police station, that is why the suspected items indicated in the certificate of seizure were completely different from those he retrieved after the search. On the contrary, what differs in the record of search and the certificate of seizure is that while the record of search indicates three items were intended to be searched at the appellant's house, the narcotic drugs (bhang) is not indicated in the Certificate of Seizure on the contention that it was not found after the search.

Moreover, the certificate of seizure filled by PW1 also casts doubts on what was actually seized in the appellant's house. Particularly, part 3 of exhibit P3 which concerns a certificate of seizure indicates the following:-

> *"I No..... Rank SP Name Elisante Ulomi do hereby certify that to have conducted a search (date) 19/02/2017 at (place) Ibani and the under mentioned things were seized:*
>
> 1. *(Boniface Siami) Ngozi ya Chui*
> 2. *Ngozi ya Nguchiro."*

Interestingly, as it can be gleaned from the reproduced part above, the first item seized indicates, in bracket, the name of "Boniface Siami" followed by Ngozi ya Chui (Leopard hide). We, therefore, wonder whether Boniface Siami indicated in item No.1 of exhibit P3 is also known as "Ngozi ya Chui" to be categorized as one of the item (government trophy) which was seized on 19th February, 2017 at the appellant's house. We say so because, according to the same exhibit "Boniface Siami" is also listed as one of the independent witnesses to the search who actually signed to indicate that he was present on the particular day.

Regrettably, during evaluation of the evidence with regard to exhibit P3, the learned trial judge did not state anything concerning the apparent anomaly. In our respectful view, the defect cannot be taken as a slip of the pen in view of the problem on the authenticity and absence of some of the signatures of witnesses which is apparent in exhibit P3.

Admittedly, signatures of some witnesses, including that of the appellant leaves much to be desired to the extent of casting doubts to the authenticity of exhibit P3. To begin with, the signature of the appellant who was referred as accused, is firstly indicated as "P. Mwinuka" below his name. However, another signature which is more less the same as that of the appellant is appended below the name of Casto Mchilo (PW2).

The major difference in those signatures is that while the former is in capital letters, the latter is in small letters and thus they bear different handwritings. Be that as it may, according to the record of appeal, it is plain that PW2 did not sign exhibit P3. It is evident that during cross examination PW2 conceded that he did not sign the certificate of seizure which is part of exhibit P3. For clarity, the following PW2's testimony at page 35 of the record of appeal speaks for itself thus:-

> *"Yes, I can read and write.*
>
> *Court: The witness is asked to sign on a piece of paper.*
>
> *I wrote my name on the certificate of seizure/ search warrant. There is no my signature on the certificate which is shown to me (court- exhibit P3) but there is my name on it."*

Notably, the above testimony is contrary to what PW2 stated in his evidence in chief where he confirmed to have appended his signature to exhibit P3. For consistency, this is what he stated at page 33 of the record of appeal:-

> *"After that the police officers recorded statements. Before then, the police asked us to sign on a piece of paper. I can identify the paper which I signed because I appended my signature on it. Here*

*before me is the piece of paper which I signed. It has my name endorsed on it, we filled out the form at the house of Pascal Mwinuka. Then we went to the police station".*

Clearly, PW2 cannot be held to be a credible witness in view of the evidence concerning his signature on exhibit P3. We hold this firm view because, if he was really shown exhibit P3 during examination in chief and confirmed that his signature existed, why during cross-examination he readily admitted that save for the name, his signature was not there. Moreover, we are of the view that PW2's evidence that he wrote his name on the seizure certificate and was only called upon to sign it doubtful. Indeed, his testimony is inconsistent with the testimony of PW1 who stated that he is the one who wrote the names of those who attended the search and they were only called to sign.

We are mindful of the finding of the trial judge that PW2 being a neighbour of the appellant had no reason to lie against him on the search and seizure of the items stated in exhibit P3. Equally important, we take note of his finding that PW2 was actually present to witness the search which was conducted by PW1 and other police officers including PW4 and DC Lwata. However, given the material contradiction in his evidence, PW2 cannot be taken as a witness of truth. Generally, his contradictory

testimony casts doubt on whether he was really present during the search. We are therefore of the considered opinion that the evidence of PW2 cannot support the evidence of PW1.

Moreover, as the alleged search was conducted in terms of section 38 (1) of the CPA, we are settled that signature of witnesses who were present was important in the circumstances of this case in terms of section 38 (3) of the CPA which provides as follows:-

> *"(3) Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any".*

In the present appeal, it is not doubted as we have alluded to above, that the signature of the appellant is questionable as he seems to have signed in two different places, including that of the independent witness (PW2) and using different handwriting. More importantly, as we have indicated above, PW2 readily admitted that his signature was not appended to exhibit P3. It is therefore not known why the appellant was

called upon to sign twice, first as an accused and second as an independent witness.

The importance of appending signature of the witnesses who witnessed the search was emphasized in **Mustafa Darajani v. The Republic**, Criminal Appeal No. 277 of 2008 where the Court quoted its previous decision in **Selemani Abdallah and Others v. The Republic**, Criminal Appeal No. 384 of 2008 (both unreported) in which it was stated, among others, that:-

> *"(1) Upon completion of the search, if any property is seized, a receipt must be issued which must be signed by the occupier or owner of the premises and the witnesses around, if any, as required under section 38 (3) of the CPA.*
>
> *(2) The whole purpose of issuing a receipt to the seized items and obtaining signatures of witnesses is to make sure that the property seized came from no place other than the one shown therein. If the procedure is observed or followed, the complaints normally expressed by suspects that evidence arising from such search is fabricated will to a great extent be minimized".*

Similarly, in the present appeal, we think that the complaint of the appellant in his defence that the search was fabricated because it was conducted in his absence and the seized government trophies were not found in his house, cannot be treated lightly. The raised doubt is compounded by the material contradictions in the evidence of PW1, PW2 and the glaring anomaly in exhibit P3 which we have exposed above.

In addition, we are of the considered opinion that the doubt on the propriety of the search and the seized items is compounded by the fact that some of the witnesses to the search and seizure were not summoned to testify at the trial. We are however, alive to the submission of Ms. Mpagama that the prosecution is not bound to summon any particular number of witnesses in the case, much as what matters is the credibility and not numbers. In this regard, the learned State Attorney was firm that the absence of DC Lwata and other witnesses was of no effect to the prosecution case.

Nevertheless, on our part, we wonder why Boniface Siame, who was one of the independent witnesses and actually signed exhibit P3 was not called to testify at the trial. His testimony, in our settled view, becomes more important on account of the unreliable testimony of PW2 whose credibility is questionable for the failure to append his signature to exhibit

P3. We are also surprised why Bora Mwinuka, a relative of the appellant was not summoned to testify in support of the prosecution case. Notably, in their testimony PW1, PW2 and PW4 confirmed that he was present during the search. Indeed, his absence is not withstanding the position that in terms of the provisions of Section 38 (3) of the CPA, one among the witnesses who may be present at the search and actually sign the seizure certificate is the relative of the suspect. Apparently, in view of what we have stated above with regard to the authenticity and lack of signatures of some witnesses in exhibit P3, what remains is the signatures of PW1 and DC Lwata who was not summoned to testify. Unfortunately, as we have patently found above, in view of material contradiction in PW1's testimony, he can no longer be taken to be a witness of truth as his credibility is questionable. On the other hand, it is also not known why PW4 a police officer who is said to have attended the search did not sign.

At this juncture, while we agree with Ms. Mpagama that in terms of section 143 of the Evidence Act, Cap 6 R. E. 2019, a party is not compelled to parade a certain number of witnesses to support his case as also rightly observed by the Court in **Separatus Theonest @ Alex v. The Republic**, Criminal Appeal No.135 of 2003 (unreported), we however hold the firm view that this is not always the position in every case. Equally important, it is settled that depending on the circumstances of the case,

failure to summon an important witness at the trial entitles the court to draw adverse inference to the respective party's case. It is in this regard that in **Aziz Abdallah v. The Republic** (1991) TLR 91 it was stated that:-

> *"Where a witness who is in a better position to explain some missing links in a party's case is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one".*

(See also the decision in **Kikuyu Mondi v. The Republic**, Criminal Appeal No. 99 of 1991 (unreported) and **MT 7479 SGT Benjamin Holela v. The Republic** [1995] TLR 121).

Similarly, in **R v. Uberle** (1938) 5 EACA 58, the defunct Court of Appeal for Eastern Africa held that:-

> *"The court is entitled to presume that evidence which could be but is not produced would if produced be unfavorable to the person who withheld it."*

In the instant appeal, we are also entitled to presume to the contrary. Particularly, in the circumstances of the appeal before us, we are entitled to draw an adverse inference on account of PW1 and PW2's questionable credibility and the failure of the prosecution to summon

some important witnesses like DC Lwata and Boniface Siame who signed exhibit P3. We hold this firm view because, even PW4 a police officer, who testified at the trial to have witnessed the search, did not sign exhibit P3 and no explanation was given. On the contrary, DC Lwata who signed and despite being the person who led the search and found exhibit P1 (the Leopard hide) was not summoned to testify and no plausible explanation was given by the prosecution.

On the other hand, we are mindful of the submission by Ms. Mpagama that in terms of the provisions of section 106 of the WCA, depending on the circumstances; the need of the presence of an independent witness can be dispensed with. However, our close reading of that provisions leads us to the observation that an independent witness can only be dispensed with if the search is held in places other than a dwelling house. This is not the case in the present appeal. Thus, even if the police officer could have acted under the provisions of section 106 of the WCA in conducting the search, the requirement of the presence of at least one independent witness could not have been avoided. For the sake of consistency, we extract the said provisions hereunder;

> *"106 (1) Without prejudice to any other law, where any authorized officer has reasonable grounds to believe that any person has*

*committed or is about to commit an offence under this Act he may-*

(a) *Require any such person to produce for his inspection any animal, game, meat, trophy or weapon in his possession or any license, permit other document issued to him or required to be kept by him under the provisions of this Act or the Arms and Ammunition Act;*

(b) *Enter and search without warrant any land, building, tent, vehicle, aircraft or vessel in the occupation or use of such person, open and search any baggage or other thing in his possession.*

***Provided that no dwelling house shall be entered into without a warrant except in the presence of at least one independent witness;*** *and*

(c) *Seize any animal, livestock, game meat, trophy, weapon, license, permit or other written authority, vehicle, vessel or aircraft in the possession or control of any person and, unless he is satisfied that such person will appear and answer any charge which may be preferred against him, arrest and detain him".* (Emphasis Added)

Be that as it may, in the instant appeal, since the police officer in charge (PW1) issued the search order (exhibit P3) under the provisions of section 38 (1) of the CPA, we are settled that the procedure laid down under the provisions of section 38 (3) had to be complied with fully. Thus, since the credibility of PW2 is questionable because he did not sign exhibit P3, if another independent witness, namely, Boniface Siame who allegedly signed it could have been summoned to testify he would have filled the gap caused by the unworthy evidence of PW2. In this regard, in the circumstances of this appeal, section 106 of WCA could not apply as the process of search and seizure was initiated under section 38(1) of the CPA using Police Form No.91 issued in terms of section 35 of the Police Force and Auxiliary Services Act [Cap 322 R. E. 2002].

Therefore, in view of our deliberation above with regard to the complaint in ground two of the appeal, we do not hesitate to hold that the search and seizure was improperly conducted contrary to the provisions of section 38 (1) and (3) of the CPA. We also respectfully, differ with the finding of the trial judge that PW1 and PW2 are trustworthy witnesses. Consequently, we exclude exhibit P3 from the record of proceedings and hereby allow the second ground of appeal for having merit.

Having allowed ground two of the appeal, we think, we have no need to consider ground three of the appeal as the relevance and necessity of determining the chain of custody is entirely dependent on the propriety of search and seizure procedure and the authenticity and legality of exhibit P3, which we have excluded from the record. Thus, as exhibits P1 and P2 had a bearing on exhibit P3 and depended also on the credibility of PW1, who tendered them and the reliability of the testimony of PW2 and PW4, the same cannot be considered to have any value in the circumstances. We are firm that the evidence of PW1, PW2 and PW4 cannot be relied upon to ground conviction of the appellant.

The next crucial question to be determined by us at this point is the complaint in ground four of the appeal that the prosecution did not prove the case beyond reasonable doubt. To this question, we are settled that the answer is no. It is apparent that having discredited the evidence of PW1, PW2, and PW4 and excluded exhibit P3 from the record of the trial court's proceedings, the only evidence which remains is that of PW3 who tendered exhibit P4. However, since the valuation of the said trophies (exhibits P1 and P2) depended entirely on the propriety of the search order and certificate of seizure, which we have held to be improperly conducted, we hold similar view that the evidence of PW4 and exhibit P4 cannot sufficiently prove the case for the prosecution. On the contrary,

we find that the doubt raised by the appellant entitles us to conclude that the prosecution did not prove the case beyond reasonable doubt as found by the trial judge. In this regard, we have no other option than to interfere with the finding of the trial court on the conviction of the appellant.

In the result, we allow the appeal, quash conviction and set aside the sentences of imprisonment and order for payment of fine in respect of both counts. Accordingly, we order that the appellant be released from custody unless otherwise held lawfully.

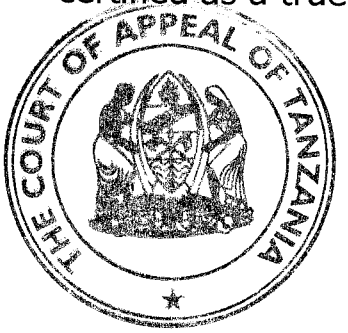
**DATED** at **IRINGA** this 4th day of May, 2021.

G. A. M. NDIKA
**JUSTICE OF APPEAL**

F. L. K. WAMBALI
**JUSTICE OF APPEAL**

B. M. A. SEHEL
**JUSTICE OF APPEAL**

The judgment delivered this 5th day of May, 2021 in the presence of the appellant linked via video conference at Iringa Prison, and Ms. Edna Mwangulumba, State Attorney for the respondent/Republic is hereby certified as a true copy of the original.




B. A. Mpepo
**DEPUTY REGISTRAR**
**COURT OF APPEAL**