

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MUSOMA**

**(CORAM: NDIKA, J.A., KOROSSO, J.A., And MAKUNGU, J.A.)**

**CRIMINAL APPEAL NO. 180 OF 2020**

**SAMWELI KIBUNDALI MGAYA ..... APPELLANT**

**VERSUS**

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

**(Appeal from the Judgment of the High Court of Musoma at Musoma)**

**(Kahyoza, J.)**

**dated the 19<sup>th</sup> day of March, 2020**

**in**

**Criminal Appeal No. 166 of 2019**

**.....**

**JUDGMENT OF THE COURT**

6<sup>th</sup> & 14<sup>th</sup> June, 2022

**MAKUNGU, J.A.:**

In the District Court of Serengeti at Mugumu, Samweli Kibundala @ Mgaya, the appellant was arraigned and charged along with another person who is not subject to this appeal with one count of Unlawful Possession of Government Trophies contrary to section 86 (1) and (2) (e) (ii) of the Wildlife Conservation Act, No. 5 of 2009 (the WCA) read together with paragraph 14 (d) of the first schedule and sections 57 (1) and 60 (2) of the Economic Organised Crime Control Act, [Cap. 200. R.E. 2002]. After a full trial he was convicted and sentenced to a term of twenty five (25) years. He was displeased by both the conviction and

sentence but he unsuccessfully appealed to the High Court. Still adamant, he decided to lodge this second appeal.

The brief factual background of the case is that, the appellant and another person Neema Thomas @ Koroso were on the 8<sup>th</sup> November, 2016 at Stand Mpya Mugumu within Serengeti District allegedly found in unlawful possession of pieces of meat identifies to be that of a wildebeest. They were arrested and charged. Wilbroad Vicent (PW2) a wildlife warden, identified the meat as being that of the wildebeest. He identified that the meat was between grey and darker brown in colour and that the fresh meat had white oil all which signified to him that it was wildebeest. He valued it at TZS 1,430,000/=.

The trial court read the charge to the appellant and Neema Thomas. On 9<sup>th</sup> November, 2016 and the prosecution tendered 30 pieces of dried and 2 fresh pieces of meat of wildebeest as exhibit P1. The trial court ordered the same to be destroyed.

In his defence, the appellant (DW1) denied to have committed the charged offence. He stated that he was arrested on 8<sup>th</sup> November, 2016 by four police officers who took him to police station. The next day he was brought before the trial court and charged with this offence.

After hearing the evidence of both sides as earlier stated, the trial court convicted the appellant as charged.

On appeal, the High Court agreed with the trial court's finding that there was enough evidence for the trial court to convict the appellant on the said offence and dismissed the appeal, save for the sentence which was reduced to 20 years.

The appellant's memorandum of appeal to the Court has five grounds which are based on the following complaints:-

- 1. The evidence of PW1, PW2 and PW3 contradicted on material facts.*
- 2. The case was not proved beyond reasonable doubt.*
- 3. The defence of the appellant was not considered.*
- 4. There was no independent witness in the process of searching.*

At the hearing of the appeal, the appellant appeared in person without legal representation. The respondent Republic was represented by Mr. Isihaka Ibrahim and Ms. Agma Haule, both learned State Attorneys.

When invited to argue his appeal, the appellant adopted his grounds of appeal and preferred to let the respondent's counsel to respond first but reserved his right to rejoin, should need arise.

Upon taking the floor, Mr. Ibrahim started by supporting the appeal of the appellant. His support was solely in respect of the complaint of the

appellant in ground two. He stated that, although the searching of the appellant's house resulted to the discovery of the alleged trophies, the seizure of the same was done in contravention of section 38 of the Criminal Procedure Act Cap. 20 R.E. 2019 (CPA). He pointed out the irregularities to include:- **one**, no search warrant was issued in respect of the conducted search, **two**, no independent witness was called to witness the conducted search, **three**, no receipt was issued to the appellant to acknowledge the seizure of the trophies and **four**; the evidence given by PW1 and PW3 was inconsistent regarding the place where the pieces of meat were found. Mr. Ibrahim argued that the pointed-out flaws raised doubt to the legality of the conducted search and consequently the seizure of the trophies. Besides, he contended, the flaws render exhibit P1 to have no evidential value. The said exhibit later on was expunged by the first appellate court because in the trial court it was tendered by the prosecutor which renders the case to have no feet to stand on and consequently the case was not proved beyond reasonable doubt.

The appellant in his rejoinder had nothing much but joined hands with the submission of the learned State Attorney.

Having heard the submissions from the parties, the main issue for our determination is whether the prosecution proved their case beyond

reasonable doubt. In dealing with this issue, we shall start with the propriety or otherwise of the search and seizure. To appreciate our deliberation, we think it is imperative to start with the position of the law. We are cognizant that any authorized officer under the WCA is vested with the power of search and seizure in terms of section 106 of the WCA. In particular, section 106 (1) (b) allows any authorized officer to enter and search without warrant any land, building, tent, vehicle, aircraft or vessel in the occupation of such person, open and search any baggage or other thing in his possession subject to the proviso that no dwelling house shall be entered into without a warrant except in the presence of at least one independent witness.

However, since the provisions of section 106 (1) of the WCA have expressly been made "without prejudice to any other law," it is our view that any search under the said law has to comply with the general law on investigation of crimes and criminal trials that is, the CPA. Thus, for the purpose of this appeal, the provisions of section 38 (1) and (3) of the CPA on the power of search and seizure are relevant. They state as hereunder:

*"38.-(1) Where a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box receptacle or place.*

- (a) anything with respect to which an offence has been committed;*
- (b) anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of an offence;*
- (c) anything in respect of which there are reasonable grounds to believe that it is intended to be used for the purpose of committing an offence, and the officer is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property, he may search or issue a written authority to any police officer under im to search the building, vessel, carriage, box, receptacle or place as the case may be.*

*(2) N/A*

*(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, bearing 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."*

Deducing from the quoted provisions of law, no search of a premises shall be effected without **one;** search warrant, **two;** the presence of the owner of the premises, occupier or his near relative at the search premises, **three;** the presence of an independent witness who is required to sign to verify his presence and **four;** issuance of a receipt acknowledging seizure of property.

Our perusal on the record of appeal denotes PW1 was the one who went to the alleged appellant's house to trace the meat assisted by other police officers. It is on record that they did find the appellant and PW3 and they decided to enter the house for search purpose and seized the pieces of meat found into the room, allegedly to be of the appellant. However, PW1 had neither a search warrant nor search order authorizing him to conduct it. This means the search was illegal from the very beginning. We need not emphasize more on the importance of this requirement which is geared to safeguard the constitutional right to dignity and privacy of a person. We understand that, under certain circumstances, an emergency search under section 42 of the CPA dispenses with the requirement for search warrant or search order. But we hold the firm view that the circumstances in this case do not fall into that exception. We say so because PW1 and other police officers received information of the incident earlier, they made follow up and later went to

search the house. Considering that the whole process started at the police station, we think PW1 had ample time to seek and obtain a search warrant or search order and thus the issue of an emergency search does not arise at all.

The record of appeal further reveals that, the pieces of meat were seized after PW1 entered the door of the appellant's room. According to the law, the search has to be conducted in the presence of the owner, occupier or a near relative who would be required to sign a certificate to acknowledge the search and seizure, if any. The appellant was present but he did not sign any certificate and there was no any independent witness to the search despite the searched building being a dwelling premises. Further to that, PW1 who led the search did not issue a certificate of seizure on what was seized. The need to issue a certificate of seizure was emphasized in our recent decision in **Shabani Kindamba v. Republic**; Criminal Appeal No. 390 of 2019 in which an excerpt in our earlier decision in **Selemani Abdallah and Others v. Republic**, Criminal Appeal No. 354 of 2008 (both unreported) was referred wherein the Court stated:-

*"The whole purpose of issuing receipt to the seized items and obtaining signature of the 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 the evidence arising from such search is fabricated will to a great extent be minimized.”*

In our view, all the officials at the scene had interest to serve, as such the absence of an independent witness eroded the credence of the search conducted even if the search warrant or order had been obtained. To crown it all, though PW3 did witness the search, yet she was arrested and charged together with the appellant before she became the prosecution witness. In our view, she was not qualified to be an independent witness. The pointed out flaws create doubts if at all the search was conducted, and as the rule of thumb goes, the doubts are resolved in favour of the accused. To say the least, the conducted search was illegal and so was the seizure, as such, it was wrong to ground conviction of the appellant basing on exhibit P1 and the testimony of PW3 who was a co-accused at one time.

In the end, we find the second ground to have merit and sufficient to dispose of the appeal. We therefore agree with the appellant and the learned State Attorney who supported the appeal that the prosecution did not prove the case against the appellant beyond reasonable doubts. In the circumstances, we find no need to address other grounds of appeal.

In the upshot we allow this appeal, quash the conviction and set aside the sentence imposed on the appellant. We order the appellant's immediate release from prison unless he is being held for another lawful cause.

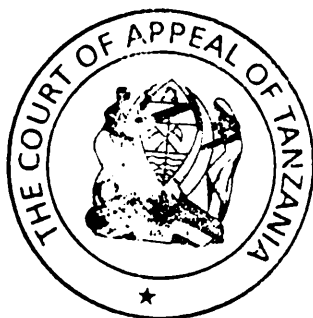
**DATED** at **MUSOMA** this 13<sup>th</sup> day of June, 2022.

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

W. B. KOROSSO  
**JUSTICE OF APPEAL**

O. O. MAKUNGU  
**JUSTICE OF APPEAL**

The Judgment delivered this 14<sup>th</sup> day of June, 2022 in the presence of the Appellant in person and Mr. Isihaka Ibrahim, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



*C. M. Magesa*  
C. M. MAGESA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**