

**IN THE HIGH COURT OF TANZANIA
(DODOMA DISTRICT REGISTRY)**

**AT DODOMA
(APPELLATE JURISDICTION)**

DC CRIMINAL APPEAL NO. 31 of 2021

(Original from District Court of Dodoma at Dodoma Economic Case No. 3 of 2018)

**1. YOHANA TIBU MADEHA }
2. ABDALLAH MBWANA } APPELLANTS**

VERSUS

THE REPUBLIC RESPONDENT

9/9/2021 & 15/9/2021

JUDGMENT

MASAJU, J

The Appellants, Yohana Tibu Madeha and Abdallah Mbwana, (The 1st and 2nd Appellants respectively) were charged with, and convicted of UNLAWFUL POSSESSION OF GOVERNMENT TROPHY and UNLAWFUL DEALING IN GOVERNMENT TROPHY, the 1st and 2nd counts respectively before the Resident Magistrates' Court of Dodoma at Dodoma. They were sentenced to serve twenty (20) years imprisonment on the first count and two (2) years imprisonment on the 2nd count respectively, the sentence thereof running concurrently. Hence this Appeal to the Court against the conviction and sentence, taking issues with the trial court's judgment on

matters of law and facts. Their Petition of Appeal is made up of ten(10) grounds of Appeal which essentially are to the effect that the prosecution case against them before the trial court was not proved beyond reasonable doubt.

When the Appeal was heard in the Court on the 9th day of September, 2021 the layman Appellants appeared in person and adopted their grounds of appeal in the Petition of Appeal to form their submissions in support of the appeal in the Court as they prayed the Court to allow the appeal allegedly because they did not commit the offences they had been convicted of.

The Respondent Republic, in the service of the learned Senior State Attorney, Mr. Harry Mbogoro, supported the appeal on the 2nd count stating that the particulars of the offence and the evidence adduced thereof fell short of specifically establishing the nature of the alleged dealing whether selling, trafficking etc. That, the vague particulars made the charge on the said count defective. That, the conviction and sentence thereof should be quashed and set aside accordingly.

The Respondent however, contested the Appeal on the 1st count reasoning that the offence was proved beyond reasonable doubt since the Appellants were found in possession of the government trophy at the scene of crime in the 5th room of Moscow Guest House, at Mkoka village upon the search which was done and the government trophy seized in the presence of the prosecution witnesses Donali Thomas Maheri (PW2), Inspector Anthony Mahembega (PW3), Japhet Yaheni Mato (PW4), Mberee

Nanguruka (PW6) and G.1126 DC, Msafiri (PW7), particularly PW2, PW3 and PW6. That, the appellants were arrested upon a well laid trap to arrest them there at the scene of crime. That, the Certificate of Seizure thereof was admitted in evidence as Exhibit P3. That, the search and seizure was eyewitnessed by PW6, the proprietor of the Guest House, the scene of crime where the Appellants were arrested whilst in possession of the Government trophy.

The Respondent admitted that there was no Guest House visitor's registration book that was admitted before the trial court as a proof of the Appellants' being residents therein on the material day but the missing of such documentary evidence was due to the fact that they had only shortly entered the Guest House when they were searched and arrested. The Respondent also conceded that there was no search warrant which was admitted in evidence before the trial Court.

The Respondent Republic argued that chain of custody of the government trophy was proved before the trial Court as per Exhibit P9. The Court however has not seen such marked exhibit in the original record. The Respondent cited **Jonas Ngolida V Republic** (CAT) Criminal Appeal No. 351 of 2017 Dodoma Registry and **Mwiny Jamal Kitalamba@Igonza & 4 others V the Republic** (CAT) Criminal Appeal No. 348 of 2018, Dodoma Registry in support of her position on the 1st counts. The Respondent prayed the Court to dismiss the appeal on the 1st count (UNLAWFUL POSSESSION OF GOVERNMENT TROPHY). That is all by the parties.

According to Section 20 of the Economic and Organised Crime Control Act, [Cap 200 RE 2019] the investigation of all economic offences shall be conducted in accordance with the provisions of the Criminal Procedure Act, [Cap 20]. Section 22 of the Economic and Organised Crime Control Act, [Cap 200] provides for search and seizure of property by Police officers. So by virtue of section 20 thereof such search and seizure should be in accordance with the provisions of the Criminal Procedure Act, [Cap 20] in respect of search and seizure of the property pursuant to section 38 of the Criminal Procedure Act, [Cap 20 RE 2019].

In the Instant case, since the search and seizure of the Appellants at the alleged scene of crime (Guest House) was conducted under Section 38 of the Criminal Procedure Act, [Cap 20] all the injunctions thereof have to be complied with accordingly for legality of the search and seizure thereof.

A/Insp. Anthony Mahembega (PW2) who searched the premises (Guest House) was not incharge of any police station but he was allegedly ordered by his Officer Commanding Station (OCS) to team up with other police officers in the ant poaching unit in order to follow up and arrest the Appellants should have a written authority (warrant) to conduct the search accordingly. In the absence of the written warrant of search thereof, the purported search and seizure thereof was illegal, in terms of section 38 (1) of the Criminal Procedure Act, [Cap 20 RE 2019].

Secondly, since the purported search and seizure was in pursuit of the investigation of the economic offence in a dwelling house (Guest House) the search and seizure should have been in the presence of independent

witness pursuant to Section 106 (1) of the Wildlife Conservation Act, [Cap 283 RE 2019]. Mbereee Nanguruka (PW6) and Kyambei Mbereee (PW5) the husband and wife respectively who own the scene of the crime, the Guest House, are witnesses with interest to serve hence do not qualify for independent witnesses though they were obliged to sign the Certificate of Seizure under Section 38 (3) of the Criminal Procedure Act, [Cap 20].

Thirdly, contrary to section 38(3) of the Criminal Procedure Act, [Cap 20 RE 2019] the witnesses to the search and seizure, G.3738 D/C Hassan and Kyambei Mbereee (PW5) did not sign on the Certificate of Seizure (Exhibit P3). The non compliance with the legal requirement of search and seizure not only casts doubt on the credibility of the prosecution case on the purported search and the documentary evidence (certificate of seizure thereof) but also renders it discountable from the record of evidence for want of legality. The said certificate of seizure (Exhibit P3) is hereby expunged from the record of evidence accordingly.

The missing of the Guest House visitors' registration book in evidence casts doubt on the Appellants' alleged lodging there as per cautioned statements (Exhibit P4 & P7 respectively) and in contradiction to Kyambei Mbereee (PW5) who testified that on the material day, that is on 4th day of January 2018, no sooner had the Appellants arrived at the Guest House than the police officers arrived at the Guest House prior to the Appellants' registration in the visitors' book. The contradiction between Kyambei Mbereee (PW5) and Mbereee Nguruka (PW6) on one hand and prosecution exhibits P4 and P7 on another hands taints negatively the would be prosecution case credibility on the question as to whether or not the

Appellants were residents of Moscow Guest and they were arrested therein on the material day.

Lastly, the purported chain of custody document (Exhibits Register) which was alleged admitted in evidence and marked Exhibit P9 bears no any mark to that effect. That is contrary to the law which requires the marking the exhibits which are admitted in evidence. That being the case, the photocopy of the document intended to establish chain custody is hereby expunged from the record of evidence.

All in all, having so reasoned, the Court is of the considered position that the prosecution case against the Appellants before the trial court was not proved beyond reasonable doubt on both counts as so rightly argued by the Appellants in their grounds of appeal.

The meritorious appeal is hereby allowed accordingly. The conviction and sentence of twenty (20) years and two (2) years on the 1st and 2nd count respectively are hereby severally and jointly quashed and set aside. The Appellants severally shall be released forthwith from prison except if there was a lawful cause.




GEORGE M. MASAJU

JUDGE

15/9/2021