IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 49 OF 2021

(Originating from Criminal Case No. 16 of 2017 of Siha District Court)

RITHA GOODLUCK MOSHA.....APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

1/11/2021 & 1/12/2021

SIMFUKWE, J.

In the District Court of Siha at Sanya Juu, Ritha Goodluck Mosha, hereinafter referred to as Appellant was charged and convicted with the offence of unlawful possession of Government Trophies contrary to **section 86(1)(2) (c) (ii) of the Wildlife Conservation Act, No. 5 of 2009** as amended by **section 16(a) of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016** and **section 57(1) of the Economic and Organised Crimes Control Act, Cap 200 R.E 2002.**

It was alleged that on 28th day of October 2017 the appellant herein was found at Mendai Village within Siha District unlawfully possessing a trophy to wit 40 kilograms of eland meat (pofu) valued at

Tsh.3,400,000/- the property of the Government of United Republic of Tanzania.

The story of the prosecution case in a nutshell is that, following the information received by PW2 (Park Ranger) that the appellant sales wild meat at Menduni-Karansi, they sought assistance from the police station where they were given PW1 and PW3 to assist them. They both headed to the appellant together with the Village Chairman. They searched appellant's house and found wild meat. They took her together with the seized meat to the police station where her cautioned statement was recorded. The District Game Officer (PW4) thereafter identified the meat as eland meat. The appellant was arraigned before the district court of Siha (trial court) where she was charged as above.

Upon hearing the prosecution who marshalled 5 witnesses and the defence case which presented only one witness, the trial court convicted the appellant as charged and sentenced her to pay a fine of 10 times the value of trophy which is Tsh 34,000,000/- or in default to serve 20 years imprisonment.

Aggrieved, the appellant has now appealed before this Court on the following grounds;

1. *That, the trial court erred in fact and law for convicting and sentencing the appellant with the offence charged without considering that there was no chain of custody of the alleged Government trophies.*
2. *That, the trial magistrate erred in fact and law for convicting and sentencing the appellant with the offence charged without carrying the accused together with the alleged*

government trophies before the Magistrate after she had been arrested.

3. *That, the trial court erred in fact and law in convicting and sentencing the appellant basing in executed illegal search.*
4. *That, the trial court erred in fact and law in convicting and sentencing the appellant by relying on irregularly admitted certificate of seizure (exhibit P1), inventory (exhibit P4) and valuation form (Exhibit P5) which were not read over before the trial court after admission and appellant's caution (sic) statement (exhibit P4) which did not have any incriminating element to the appellant.*
5. *That the trial court erred in fact and law in convicting and sentencing the appellant without considering that the prosecution failed to prove the case in a standard (sic)required by the law.*

Hearing of this appeal was conducted *viva voce*, the appellant was represented by Mr. Elia J. Kiwia, learned advocate while the respondent was represented by Ms. Lilian Kowero, the learned State Attorney.

Mr. Kiwia adopted all five grounds of appeal to form part of his submissions. He started submitting in support of the 3rd ground of appeal where he faulted the trial court for convicting and sentencing the appellant basing on executed illegal search. The law which was contravened according to Mr. Kiwia was **section 38(1) of the CPA** which provides that there should be search warrant if the search is not an emergency one; **section 38(3) of CPA** which requires the receipt to be issued after search; **PGO 226 (1) (c)** which provides for procedures of conducting search that the police officer is not allowed to conduct

search without warrant and without order from the authority. Also, there should be a permission of a Magistrate to conduct a search. The learned counsel referred to the case of **Shaban Said Kindamba vs Republic, Criminal Appeal No. 390/2019 C.A.T** (unreported), which insisted the importance of the Magistrate to issue permission to conduct search. Again, the police officer who is allowed to conduct search is of the rank not less than A/Inspector and he/she should state the reasons for conducting the said search and fill PF 91 and thereafter a search should be conducted by the police officer or another person as per **section 34(1) of the Police and Auxiliary Service Act, Cap 332 R.E 2019.**Then report has to be sent to the magistrate as soon as possible.

Having stated the position of the law, Mr. Kiwia thus submitted that in this case according to the proceedings and records of the trial court all that was not done. According to the record search was done by PW1 D/Constable Kulwa and PW3 D/Constable Abdulai who were below the rank and all the procedures were not complied with. He added that the said search was not an emergency as per testimony of PW1 and PW3 who testified that they were assigned by the OCCID to assist Park Rangers to conduct search at the appellant's homestead who was suspected of selling wild meat.

The learned counsel insisted that in the case of **Shaban Kindamba** (supra), it was stated that if there is no emergency then it is not allowed to conduct search without complying to the laid down procedures. He also referred to page 16 of the said case where it was stated that the search was not proper since witnesses did not analyse/ state who did what as they used the plural form "we". On the basis of shortcomings of

search, Mr. Kiwia prayed the same to be resolved in favour of the appellant.

Submitting on the first ground of appeal that there was no chain of custody of the alleged Government Trophies, Mr. Kiwia contended that PW1 and PW3 stated to have conducted the search and took the suspect with the exhibit to Sanya Juu police station. Then the District Game Officer was called to identify the alleged trophy. In that respect, the learned counsel argued that handling of exhibits should be parading or documented and the exhibits should be under surveillance until tendered in court during the trial or if there is an order of disposal. Basing on this arguments and views, the learned advocate criticism in this case was that, it was not certain who was handling the exhibits, it is unknown who was given the alleged exhibits at police station and whether the same were guarded.

On the second ground of appeal, Mr. Kiwia submitted to the effect that after being arrested the appellant was not taken to the Magistrate together with the exhibit contrary to **paragraph 24 of PGO 299** which is in respect of perishable exhibits. Thus, the prosecution failed to prove the charges against the accused. So, the matter should be resolved in favour of the appellant. He made reference to the case of **Mohamed Juma @ Mpakama vs Republic, Criminal Appeal No. 385 of 2017 C.A.T at Mtwara** (unreported) at page 22 insisted the importance of taking the suspect together with the exhibits before the Magistrate and failure of which amount to denial of right to be heard.

The learned advocate made reference to the testimony of PW3 G.2309 Detective Abdullai at page 11 of typed proceedings where he stated that he took the inventory to court and not the suspect. In that regard, the learned advocate was of the view that the procedures were not complied with as per **PGO 229 para 25.**

On the 4th ground of appeal, Mr. Kiwia contended that the certificate of seizure (exhibit P1) Inventory form (exhibit P4) and Valuation Form (exhibit P5) were not read over after admission and so the same should be expunged from the record. Consequently, there will be no evidential exhibits to support the prosecution case since valuation form assists the court in assessing sentence in case the suspect is convicted.

On the 5th ground of appeal that the prosecution failed to prove their case on the required standard, it was Mr. Kiwia's contention that the prosecution evidence was contradictory in the sense that; PW1 stated that they found wild meat boiling in pot and they did not ask whether such meat is wild or not. PW2 said that they found boiled meat and the accused admitted that it was wild meat. PW3 stated that on interrogation at the police station that's when the accused admitted that it was wild meat and PW5 the Village Chairman stated that when they interrogated the accused, she said it was eland meat. In respect of the

noted contradiction, Mr. Kiwia was of the view that the contradiction goes to the root of the case. He referred to the case of case of **Mawazo Anyandwile Mwaikwanja vs DPP Criminal Appeal No. 445 of 2017. C.A.T at Mbeya at page 15** stated that:

> *"Apart from demeanour.... The credibility of witness can also be determined in other two ways that is, one by assessing the coherence of the testimony of the witness, and two, when testimony of the witness is considered in relation to the evidence of other witnesses."*

He commented that the noted contradiction in this case should be resolved in favour of the appellant.

It was further submitted that the accused in her cautioned statement denied to know the person who left the said wild meat behind her house. Thus, the cautioned statement contradicts with the evidence of prosecution witnesses. She only admitted to know the offence of which she was suspected. This cannot be termed as admission. So, the trial court reached an erroneous conclusion and convicted the appellant. The learned advocate referred to the case of **Zakaria Jackson Magari vs R Criminal Appeal No 441 of 2018** in which it was held that; -

"...a witness who lies in an important point cannot be believed in others."

He added that at page 12 and 13 of the same case it was stated that failure to cross examine the prosecution witness on material part of evidence adverse to the other part is tantamount to its acceptance.

Mr. Kiwia also argued that, this case is based on circumstantial evidence as the appellant was found cleaning her house. That circumstantial evidence should not be capable of more than one interpretation. Thus, in this case any person could have left the said meat outside the house of the appellant. Mr. Kiwia challenged the evidence of the Village Chairman that he had written a warning letter to the appellant forbidding her not to sale wild meat by stating that such letter was not tendered as an exhibit. He referred to the **case of Zakaria Jackson Magayo** (supra) which also discussed the issue of circumstantial evidence at page 11 and 12.

The learned advocate prayed the court to allow the appeal and the appellant be released from custody unless held for other lawful reasons.

In her reply to the submissions in chief, Ms Kowero for the respondent supported the appeal. On the 3rd ground of appeal the learned State Attorney admitted that the search was conducted illegally contrary to

section 38(1) of CPA read together with **paragraph 1(a)(b) (c) and 2(a) of PGO 226** which prohibit search in private premises without warrant. She stated further that, it is the police officer in charge of the police station who may issue warrant of search to any other police officer.

The learned State Attorney in support of appeal argued that all the witnesses who conducted search had no search warrant thus makes the whole search to be illegally conducted. She added that the law provides when search can be conducted without a search warrant. In respect of that, the learned State Attorney commented that all prosecution witnesses (PW1, PW2 and PW3) had prior information that the appellant was selling wild meat and for that the search was not an emergency one. She made reference to the case of **DPP vs Doreen John Mlemba, Criminal Appeal No.359 of 2019,** in which the Court of Appeal of Tanzania at page 14 held that:

> *"In other words, all things being equal, for a search into private premises to be a lawful search, it must be conducted by either an officer in charge of a police station or another police officer with a search warrant as per the provisions of section 38 (1) of the CPA and PGO No. 226 Paragraphs 2 (a) quoted above.*

In our view, the meticulous controls provided for under the COA and a clear prohibition of search without warrant in the PGO is to provide safeguards against unchecked abuse by investigatory agencies seeking to protect individual citizens' rights to privacy and dignity enshrined in Article 16 of the Constitution of the United Republic of Tanzania."

On the 3rd ground of appeal which concerns the inventory, the learned State Attorney conceded that the inventory was illegally filled since the proceeding is quite whether the appellant witnessed disposition of exhibit which is eland meat. She referred to the case of Mpakama (supra) cited by Mr. Kiwia which insisted that the disposal order of exhibit is issued by the court.

It was also argued that the said inventory was not read in court as well as other documentary exhibits. Basing on that fault, Ms. Kowero stated that since the said documents were procured without adhering to the laid down procedures, then even if they were read in court, they could have no evidential value.

The learned State Attorney concluded that the 2nd and 3rd grounds of appeal have merit and she supported the appeal.

The learned advocate of the appellant in his rejoinder supported the submissions of the Republic.

Considering the fact that the learned State Attorney supported the appeal, my task is very simple, to consider whether the conceded grounds of appeal have merit and whether the rest of prosecution evidence on record suffice to prove the offence charged against the appellant beyond reasonable doubts.

Under the 2nd ground of appeal, it has been conceded that the search was illegal for being conducted without search warrant and by the police officers who were not allowed by the law.

Concerning the issue of search warrant, the law under **section 38(1) of the CPA** is very clear, it entails that, it is the police officer in charge of a police station who may search or issue a written authority to any police officer to search the premises. The procedures of search are governed under **Part I of Police General Order.** For ease reference I quote the specific provisions which are **paragraph 2 (a), (c), (d) and (e) of PGO 226** which reads;

> *"2. (a) Whenever an O/C.[Officer In charge) Station, O/C. C.I.D. [Officer In Charge Criminal Investigation of the District], Unit or investigating officer considers it necessary*

to enter private premises in order to take possession of any article or thing by which, or in respect of which, an offence has been committed, or anything which is necessary to the conduct of an investigation into any offence, he shall make application to a Court for a warrant of search under Section 38 of the Criminal Procedure Act, Cap. 20 R.E. 2002. The person named in the warrant will conduct the search.

(c) Where an officer referred to in (a) above receives information or has reasons to believe that a person wanted in connection with the commission o f a criminal offence is in any building, he shall apply to the local Magistrate for a Warrant o f Arrest

(d) Where anything is seized in pursuance of search 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."

What I have learned from the above provisions is that, for search to be valid the following requirements must be met:

i. Search warrant in case the search is not an emergency one.

ii. The search must be conducted by officer in charge of the Station, Officer In Charge of Criminal Investigation of District, Unit or Investigating Officer.

iii. The above persons under paragraph ii shall apply to the local Magistrate for warrant of arrest

iv. Issuance of receipts acknowledging the seizure in case anything has been seized.

The purpose of having these procedures was elaborated in the case of **Badiru Mussa Hanogi vs Republic, Criminal Appeal No. 118 of 2020** at page 10-11 where the Court of appeal at Mtwara held that; -

> *"We think that procedure was purposely set out to avoid abuse of authority on the part of police officers for; it controls unauthorised and arbitrary searches in premises that may be conducted by unscrupulous police officers and therefore avoid the possibility of fabrication of evidence by planting things subject of a criminal charge."*

In the present case, as rightly conceded by learned State Attorney, the procedures as envisaged under the above provisions were not adhered to. There was no search warrant and worse enough the police officers who conducted the search were not authorised by law as they were below the prescribed rank.

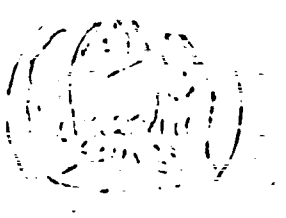
This goes without saying that the search was illegal which warrant this court to expunge exhibit P1 from the record, which also invalidate the inventory which is exhibit P4 (the inventory of Claimed Property).

The last issue which needs my determination is, whether the prosecution case can stand without these expunged documents (Exhibit P1 and P4). The answer is definitely *'NO'*. The prosecution case cannot stand without these exhibits since these exhibits touch the root of the offence as the appellant was charged with an offence of unlawful possession of Government trophies.

Having found as such, then I find no need of discussing the rest of the grounds of appeal since the two grounds of appeal alone suffice to dispose of the appeal. In the event, I hereby quash the the appellant's conviction and set aside the sentence. The appellant is henceforth set free unless lawfully held.

It is ordered.

Dated and delivered at Moshi this 1st day of December 2021.



S. H. SIMFUKWE.

JUDGE

1/12/2021