

THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY  
IN THE HIGH COURT OF TANZANIA  
(DISTRICT REGISTRY OF MOROGORO)  
AT MOROGORO

CRIMINAL APPEAL NO. 18 OF 2022

*(Original Economic case No. 22 of 2019 before the District Court of Ulanga at Mahenge)*

GERALD DAMIAN .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

*Hearing date on: 13/7/2022*

*Judgement date on: 14/7/2022*

**NGWEMBE, J:**

The appellant Gerald Damian looked exhausted, while his stomach was swollen with serious sickness, but managed to speak frequently on the nature of his appeal. That he appealed against his conviction and sentence on economic offence of being found with Government Trophies.

According to the charge sheet, the appellant found himself in loggerhead with the Government on 1<sup>st</sup> December, 2019 at Misegese Village within Malinyi District in Morogoro region, he was found possessing 15 pieces of Elephant tusks valued at USD 45,000.00 equivalent to TZS. 103,363,200/- contrary to section 86 (1) (2) (b) and



(3) (b) of the Wildlife Conservation Act, No. 5 of 2009 read together with paragraph 14 of the first schedule to and section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act [Cap 200 R.E. 2019].

In establishing and proving the accusations against the appellant, the prosecution lined up four (4) witnesses who proved the accusations against the appellant. Though he tried to defend himself against those accusations, unfortunate at the end he was caught therein and accordingly convicted and sentenced to the statutory sentence of 20 years imprisonment.

Being so convicted and subsequently sentenced, he preferred an appeal to this court. Again, his attempt to appeal was encountered with time limitation. Hence successfully opened a door by extension of time before Judge Chaba, thus timely lodged his appeal clothed with nine (9) grievances. However, being unrepresented, he solely relied on his grounds of appeal with no relevant explanation on his grounds of appeal.


In turn, the Republic was fully represented by two learned State Attorneys, namely Edgar Bantulaki and Jamila Mziray, who jointly joined hands with the appellant's grounds of appeal, but on different reasoning. Their support to the appeal was based on three grounds, namely; the prosecution failed to call material witnesses who witnessed search of the appellant; second, failure to comply with procedural rules governing search during night as required by law; and lastly, failure of the prosecution to call as a witness the second accused (Motorcyclist) who was later released but was not called to testify in court.

Based on those three grounds, the learned state Attorneys, supported the appeal by insisting that the prosecution faulted the law as was expounded in the case of **Samwel Kidumila Vs. R, Criminal Appeal No. 180 of 2020** (CAT – Msoma).

Mr. Bantulaki, insisted that since the admission of exhibit P3 was unprocedural, and since the exhibits P1 & P2 were likewise, unprocedurally admitted in court, same should be expunged from the court proceedings. Upon expunging them, nothing viable remains in the court, which is capable of constituting conviction to the appellant.

Having summarized on the parties' arguments, this court find one important issue to consider, that is, whether the prosecution established and proved the accusations against the appellant beyond reasonable doubt? I am settled in my mind that, the principles constituting the offence of being found in possession of Government trophies is well – settled in our jurisdiction. There are many authoritative pronouncements made by this court and the Court of last instance in our country.

Procedurally, the evidence of PW1 PF 19781 Assistant Inspector Aliko Mwakalindile testified at page 26 of the proceedings that, he was informed there was a person unlawfully dealing with government trophies to wit; elephant tusks. Together with others, at around 21: 30 hours, he saw two suspects on a motorcycle. They arrested them and opened a bag, in front of an independent village leader called Baptist Mandimba, and another alas they found 15 pieces of elephant tusks. Such tusks were admitted in court as exhibit P1. Also, the motorcycle was tendered in court and same was admitted marked exhibit P2.





Finally, the certificate of seizure was admitted in court marked exhibit P3.

The evidence of PW1 built a foundation of the whole prosecution case. Others supported what PW1 testified in court.

The learned State Attorney, pointed out the requirements of conducting search during night hours as was explained in clear terms in the case of **Samwel Kidumila (supra)**.

Thus, for the purpose of this appeal, the provisions of section 38 (1) and (3) of the Criminal Procedure Act on the power of search and seizure are relevant. The section is quoted hereunder:-

***Section 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 him 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, obvious no search of a box or bag or property shall be effected without; one, search warrant; two, the presence of the owner of the thing being searched; 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.

In this appeal, PW1 clearly testified that, he was informed on the presence of a person dealing with Government trophies. Meaning he was prepared and he organized a special operation. Rightly, the exhibit P3 was tendered in court which is Hati ya Kuchukuliwa Mali, meaning seizure certificate, but the search warrant was not produced and tendered in court, even receipt was not issued as required by law. It means admissibility of P1, P2 & P3 were unprocedural. 


I would therefore, agree with the learned State Attorney that the whole exercise, faulted the requisite legal procedures, hence exhibits P1, P2 & P3 should be expunged from the records. If this court expunge

those exhibits what else, the remaining evidences cannot constitute conviction against the appellant. This point alone is capable of disposing off the whole appeal, but I find necessary to consider on failure of the prosecution to call material witnesses.

Among the key witnesses who were eye witnesses were the motorist Alanus Gerald who carried the appellant during that night. other key witnesses were the two independent witnesses who witnessed the seizure of a bag carried 15 tusks. Baptist Mandimba a village leader and Fadhili Liganga were eye witnesses on that seizure. Those three witnesses among others, were key witnesses who were independent and could testify without having interest therein. Despite being eye witnesses also were available and there is no reason why they were not called to testify.

In our jurisdiction, the law is well-developed, on the consequences of failure to call material witnesses. It was stated in the case of **Azizi Abdallah Vs. R, [1991] T.L.R 91** quoted with approval by the Court of Appeal in **Mashimba Dotto @ Lukubanija Vs. R, Criminal Appeal No. 317 of 2013** (Mwanza sub registry)

*"the general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw inference adverse to the prosecution"*



Upon failure of the prosecution to call eye witnesses to the alleged search and seizure of those government trophies, weakened the case of



prosecution. On this point of law, I fully subscribe to the submission of learned State Attorney that, the prosecution failed to call relevant and eye witnesses on the scene of crime. Thus, failed to prove the case beyond reasonable doubt.

In the upshot and without considering other grounds of appeal, I allow this appeal, quash the conviction and set aside the sentence imposed on the appellant. Consequently, order the appellant's immediate release from prison unless he is being held for another lawful cause.

**I, accordingly order.**

**Dated** at Morogoro in Chambers this 14<sup>th</sup> day of July, 2022



**P.J. NGWEMBE**

**JUDGE**

**14/07/2022**

**Court:** Judgement delivered at Morogoro in chambers this 14<sup>th</sup> day of July, 2022 in the presence of the Appellant in person and Ms. Jamila Mziray State Attorney for the Republic/respondent.

**Right to appeal to the Court of Appeal explained.**



**P.J. NGWEMBE**

**JUDGE**

**14/07/2022**