**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**CRIMINAL APPEAL NO. 08 OF 2022**

*(Originating from Economic Case No. 5 of 2018 of the District Court of Same at Same)*

**DANIEL STEPHANO.....APPELLANT**

*VERSUS*

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*17/10/2022 & 11/11/2022*

**SIMFUKWE, J.**

Before the district court of Same, the appellant Daniel Stephano @ Fue Massawe was charged with the offence of unlawful possession of Government Trophy contrary to **section 86 (1) and (2) (c) (iii) of the Wildlife Conservation Act, No. 5 of 2009** as amended by the Written Laws **(Miscellaneous Amendment) Act No. 2 of 2016** read together with **Paragraph 14 of the First Schedule to the Economic and Organised Crimes Control Act, Cap 200 R.E 2002**. He was convicted and sentenced to twenty (20) years imprisonment.

It was alleged by the prosecution before the trial court that on 9/6/2018 While the day at Njoro village within Same District in Kilimanjaro region,

the appellant was found unlawfully possessing fresh meat of one bush pig valued at 450 US Dollars, worth Tshs 990,000/= the property of the Government of Tanzania.

In his defense before the trial court, the appellant denied to have committed the offence and alleged that on the fateful day he was from his farm when he was told that he had guests at home. He found people outside his house who introduced themselves and told him that they were informed that he was possessing Government Trophy in his house. They searched but could not find anything. That, they threatened him and forced him to pick a plastic bag which had meat inside it and took him to the police station.

After being aggrieved with the decision of the trial court, the appellant appealed before this court against both conviction and sentence. He advanced eight grounds of appeal:

1. *That, the learned trial Magistrate grossly erred both in law and fact in failing to consider at all the appellant's defence and make a reference of it in her determination when composing the judgment, an omission which occasioned injustice to the Appellant and unsettles the judgment.*
2. *That, the learned trial Magistrate grossly erred both in law and fact when she presided over and conducted the trial of this case while the court had no competent jurisdiction, as there was no certificate conferring Jurisdiction to the court to try such a case.*
3. *That, the learned trial Magistrate grossly erred both in law and fact in failing to note that there is highly possibility that the Exhibits could*

*have been planted in the Appellant's house fraudulently to make him appear guilty.*

4. *That, the learned trial magistrate grossly erred both in law and fact in failing to note that there was no receipt issued after the completion of the alleged search and seizure of the said wild meat contrary to section 38 (3) of the CPA. Further, after the alleged retrieval of the wild meat, there was no approval from the nearest magistrate as echoed under section 38 (2) of the CPA.*
5. *That, the learned trial Magistrate grossly erred both in law and fact in failing to note that the said search and seizure was improperly conducted contrary to section 106 (1) (a) (b) and (c) of the Wildlife Conservation Act No. 5 of 2009 and section 38 (1) of the CPA.*
6. *That, the learned trial Magistrate grossly erred both in law and fact in convicting the Appellant basing on contradictory, incredible, suspicious and highly incomprehensible evidence from prosecution witnesses.*
7. *That, the learned trial Magistrate grossly erred both in law and fact in relying upon the inventory form (Exh. P3) to hold that the alleged seized wild meat real existed, despite the same being procedurally acquired, tendered and admitted in evidence as Exhibit.*
8. *That, the learned trial Magistrate grossly erred both in law and fact in convicting and sentencing the Appellant despite the charge being not proved beyond reasonable doubt against the Appellant and to the required standard by the law.*

The appeal was argued by way of written submissions. The appellant appeared in person while Ms Mary Lucas learned State Attorney appeared for the Respondent Republic.

In support of the grounds of appeal, the appellant submitted that reading the judgment of the learned trial magistrate, it is apparent that the Honourable magistrate did not at all consider the appellant's defence in arriving at her decisions. That, the trial magistrate's findings were reached without even a casual reference to what was said and testified in defence by the appellant. The appellant alleged that it was a serious grave error in law which denied the appellant a fair hearing as it was said and decided in many occasions by the court.

It was contended that apart from reference to the defence case ealier while analyzing of the evidence from both sides, the learned trial magistrate did not mention the defence evidence anywhere in her judgment. That, the appellant in his defence said that, the case against him was framed up by the arresting officers (PW1 and PW2). He referred to page 56 of the typed proceedings where the appellant stated that:

> *"They never found any Government trophy in my house but they procured a document and forced me to sign it threatening to beat me, so I had to sign. They took me outside my house who was outside forced me to pick a sulphate bag which was outside."*

From the quoted passage, it was observed that the trial court never referred to this defence in its decision. That, the trial court only dealt with the prosecution evidence on its own and arrived to its conclusion. The appellant cited the case of **Hussein Idd and Another v. R [1986] TLR 167** where the Court of Appeal held that:

*"It was a serious misdirection to deal with the prosecution evidence on its own and arrive at the conclusion that it is true and credible without considering the defence evidence."*

He cited another case of **Farida Abdul v. R, Criminal Appeal No. 83 of 2017,** CAT at Arusha (unreported) at page 25 of the judgment the Court held the same position and cited with approval the cases of **Peter Massanja Makansi v R, Criminal Appeal No. 327 of 2007** and **Leonard Mwamashoka v. R, Criminal Appeal No. 226 of 2015** both unreported.

It was stated further that, in the latter case of **Mwamashoka** (supra) the Court held that it was not enough for the court to summarize the evidence for the defence, but it must specifically address it in arriving at its decision.

In addition, reference was made to the case of **Alfeo Valentino v. R, Criminal Appeal No. 92 of 2006,** CAT at Arusha (unreported) in which the Court held that:

*"The trial court fatally erred in not considering the defence before finding the appellant guilty."*

In the case of **Farida Abdul** (supra) the court held that the trial Judge had a duty to address the defence case even if in the end, she would have rejected it, provided she gave her reason. In this case, the appellant was of the view that if the trial magistrate had considered his defence evidence and examine the short falls together with the contradictions in the prosecution case, she would have seen that the case at hand was fabricated against the appellant.

The appellant mentioned another irregularity which is apparent on the face of the record that the case was tried and decided by the court which had no competent jurisdiction. That, no certificate conferring jurisdiction to the subordinate court was issued although consent was issued.

On the 4th ground of appeal which concerns lack of receipt, the appellant submitted that the prosecution was required to prepare, produce and tender in evidence the receipt as stipulated under **section 38 (3) of the CPA** containing the seized wild meat. That, they were supposed to make proper documentation of how the alleged meat was handled, prepare an inventory which would contain details relating to such seized wild meat including its description of quantity and mode of packing. Then they were supposed to make an application to the nearest magistrate certifying the correctness of an inventory prepared and taking of photographs in the presence of magistrate as well as the appellant. That, in this case the disposal of the alleged wild meat was done on 11/6/2018 according to PW5 and on 13/6/2018 according to PW2.

It was pointed out that in this material case the prosecution never tendered a receipt as enshrined under **section 38 (3) of the CPA.** That, the gist of **section 38 (3) of the CPA** among other things is that, upon completion of a search if anything 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. The appellant supported his contention with the case of **Seleman Abdallah and Others v. R, Criminal Appeal No. 384 of 2008,** CAT in which it was held that:

*"The above cited section of law is couched in mandatory terms and the whole purpose of issuing the receipt to the seized items and obtaining the signature of the witnesses is to make sure that the property seized come from no place other than the one shown therein. If the procedure is observed or followed the complaints normally expressed by suspect that evidence arising from such search is fabricated will to a great extent be minimized...."*

The appellant cited another case of **Patrick Jeremiah v. R, Criminal Appeal No. 34 of 2006** (CAT) in which the Court held that:

*"Failure to comply with **section 38 (3) of the CPA** is a fatal omission."*

The appellant went further by citing the case of **Andrea Augustino @ Msigara and Another v. R, Criminal Appeal No. 365 of 2018** in which it was held that:

**"Following the above section and taking into account that in the case at hand there were no receipts issued by PW2 and PW3, there is no doubt that the procedure was flawed. Again, as rightly put by Mr. Kibaha the interpretation of the word receipt given by Mr. Maugo is unfounded as there is no way the certificate of seizure or seizure form can be equated to a receipt."**

Guided by the above cited case laws, the appellant prayed this court to disregard Exhibit P1 for it contravened the law.

Moreover, the appellant complained that he was not taken before the magistrate who ordered disposal of the exhibit as required. And that if he was taken there, he was not given an opportunity to be heard. He cemented his point with the case of **Mohamed Juma @ Mpakama** (supra). Apart from that, it was also pointed out that the said Magistrate who ordered disposal of exhibit was not summoned to testify before the court. Reference was made to the case of **Boniface Kundakile Tarimo v. R, Criminal Appeal No. 350 of 2008** (unreported) in which it was held that:

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

Contradictions were noted by the appellant as another shortfall in the prosecution case between the two main witnesses, thus PW1 and PW2 in respect of the place where they found the appellant when they went to his homestead. The appellant was of the view that had the Magistrate addressed herself on those pertinent contradictions in the prosecution case which goes to the root of the case, she could not have arrived to the conclusion of convicting the appellant.

Ms Mary Lucas the learned State Attorney supported the appeal on the reason that the prosecution side failed to prove its case beyond reasonable doubt. She started by stating that PW1 and PW2 searched the house of the appellant without having search warrant contrary to **section 38 (1) of the CPA.** That, evidence of PW1 shows that the

said search was not an emergency as they had prior information. Ms Mary cemented her argument with the case of **Shaban Said Kindamba v. R, Criminal Appeal No. 390 of 2019,** CAT (unreported) in which it was held that:

> *"That the requirement of obtaining search warrant before effecting search shows the intention was to prevent abuse of powers of search and arrest. This is a general rule given under section 38 (2) of the CPA that search of a suspect shall be authorized by a search warrant unless it falls under section 42 of CPA."*

The learned State Attorney also conceded to the contradiction in respect of the place where the appellant was found when PW1 and PW2 went to arrest him. She said that the contradiction of the two witnesses' testimonies goes to the root of the case hence makes their evidence lack credibility. She cited the case of **Elia Bariki vs Republic, Criminal Appeal No. 321 of 2016** to that effect.

It was submitted further by Ms Mary that chain of custody regarding search and seizure and disposal of the seized item in this case were not complied with. That, there is broken chain of custody and a lot of doubts in the manner the exhibit moved from PW1 up to disposal. That, the handling certificates admitted as exhibit P5 and P7 in court have discrepancy that raises a lot of doubt. That, it is shown in the exhibit that on 11/6/2018 E. 7936 D/Cpl Richard handled the exhibit to H.3388 D/C Jovin. The same exhibit on the same date and almost the same hours it was handled to Prisca Sima which raises a lot of doubts on whether the exhibit handled to Jovin (PW3) was the same

exhibit handled to Prisca Sima (PW2).

Basing on the arguments she had advanced, Ms Mary stated that they support the appeal on its entirety.

Having in mind the fact that the respondent Republic supports the instant appeal, the issue for determination is *whether evidence on the record suffices to prove the offence charged beyond reasonable doubts.*

Having examined the grounds of appeal, submissions of both parties and the proceedings on the trial court's record, I do not hesitate to support the contention of the appellant in his grounds of appeal and submission. All the pointed-out weaknesses are apparent on the face of the record.

Starting with the 1st ground of appeal, it is apparent that the learned trial Magistrate did not consider the defence of the appellant in the course of composing her judgment. That, vitiates the judgment of the trial court. I fully subscribe to the authorities cited by the appellant.

On the second ground of appeal, with respect, the appellant misdirected himself as the certificate conferring jurisdiction on the trial court was filed and forms part of the trial court's record. I therefore find the 2nd ground of appeal has no merit and dismiss it accordingly.

On the 3rd, 4th and 5th grounds of appeal, I concur with the appellant that search and seizure in this case was done in contravention to the prescribed procedures.

Moreover, the contradictions on part of prosecution case speak loud on the record as correctly referred by the appellant.

I also support the fact that failure to call the magistrate who ordered disposal of the said wild meat, should have drawn an adverse inference against the prosecution.

In short, all the above noted weaknesses create reasonable doubts on part of prosecution which as a cardinal principle of criminal cases, ought to be resolved in favour of the appellant. The case of **Hassan Rashid Gomela v. Republic, Criminal Appeal No. 271 of 2018,** CAT in which the Court of Appeal underscored the land mark decision in the case of **Woolmington v. Director of Public Prosecution (1935) A.C 462** is relevant.

I therefore find this appeal has merit. The decision of the trial court is hereby quashed and sentence set aside. The appellant should be released from custody immediately, unless he is held for other lawful reasons. Appeal allowed.

Dated at Moshi this 11th day of November 2022.


**S.H.Simfukwe**

**Judge**