

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

**AT TABORA**

**DC. CRIMINAL APPEAL NO. 67 OF 2021**

*(Originating from Tabora Resident Magistrate Economic Case No.  
45/2018)*

**SAID S/O AMAN.....APPELLANT**

**VERSUS**

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

**JUDGMENT**

Date: 25/11/2022 & 17/2/2023

**BAHATI SALEMA, J.:**

The appellant hereinafter **SAID S/O AMANI** was charged with two counts. First, the offence of unlawful possession of ammunition contrary to sections 21(a) and (b) of the Firearms and Ammunition Act, No.2 of 2015 read together with paragraph 31 of the 1<sup>st</sup> schedule and sections 57(1) and 60(2) of the Economic Crime Organized Control Act, Cap. 200 as amended by written laws (Miscellaneous Amendment) Act No. 3 of 2016; and second, unlawful possession of government trophy contrary to section 86(1) and (2) (c) (iii) 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 as amended by the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016. The appellant was found guilty and was sentenced.

This appeal is against the conviction entered and a sentence meted out by the Resident Court of Tabora.

The accused person pleaded not guilty hence the matter inevitably proceeded to a full trial. In a bid to prove the accusations, the prosecution paraded a total of four witnesses who are PW1 Emmanuel Kasimashi Kihumbi, PW2 E8442 DCPL Amos, PW4 WP 6985 DC Tabu Christopher Maganga police officers. In addition, the prosecution produced four (4) exhibits namely, the certificate of seizure (P1), the ring made of elephant tails, the wildebeest tail and two pieces of genet (P2) valuation form (P3). The accused, on his part, called 2 witnesses.

The prosecution account was to the effect that on 17 December, 2018 during the evening PW1 Emanuel Kasimashi Kihumbi, PW2 E 8442 DCPL Amos, PW4 WP 6985 DC Tabu Christopher Maganga received information from a secret informer that the accused Said Aman, a resident of Mwanamakola sublet Sikonge ward in Sikonge district was in unlawful possession of a gun. They went to Sikonge police station accompanied by CPL Almas and DC Seleman at Sikonge police Station in association with DSSGT Jumapili.

They went direct to the house of the accused. They knocked the door and after introduction the accused allowed them to search his house. According to the prosecution, they could not find any gun but one bullet. They questioned him about the license but he had none. He told them he had surrendered it to the police some years back. During the search, they found two pieces of genet skin, one tail for wild beasts and one ring made of tail for elephant skin.

PW2 prepared and signed a certificate of seizure which was revealed by the accused person and was admitted as exhibit P1 and PW2. Also tendered the tail for wildebeest, the ring made of elephant tail two pieces of skin for genet and one bullet were collectively admitted as P2. Thereafter the accused was arrested and sent to the police station.

While at the police station, the Regional Crime officer wrote a letter to the Tanzania Wildlife Management Authority on the Anti-poaching unit requesting for identification and valuation of that ring, two pieces of skin and one tail. PW3, a game officer identified the wildebeest tail was valued at 650 USD, the skin for a genet animal was valued at 250 USD, and the hair for an elephant tail at 15,000 USD and made an evaluation of both having TZS 34,000,000/=. The valuation report and a letter replying to an application were admitted as exhibit P3.



PW4, WP 6985DC Christopher Maganga testified to the court that they went to the house of the accused before searching his house, they asked him to call a leader of that area but he said the leaders were living far since he was isolated in the middle of the bush.

In defence, the accused denied the allegations. Upon closure of the evidence for both sides, the trial magistrate was satisfied that the prosecution case was proved beyond reasonable doubt against the accused in all two counts. Consequently, he was convicted

The appellant being dissatisfied with the impugned decision and conviction filed a petition of appeal containing the following grounds namely;-

- I. That, the case for the prosecutions was not proved, against the appellant, beyond reasonable doubt, as required by the law.*
- II. That, the learned trial magistrate erred in fact and law to find and hold that the appellant was found in possessions of ammunition and assortments of government trophies in a search where no independent witness was associated as required by the law.*
- III. That, PW3 (A game warden) did not lay a foundation of his expertise which enabled him to identify exhibit P2 as being government trophies since being a game warden does not confer him automatic competence to identify trophies.*

- IV. *That, there was a break in the chain of custody of the government trophies allegedly impounded from the appellant in the search conducted on 17/12/2018 at his house.*
- V. *That, PW1, PW2 and PW4 did not identify exhibit P2 in court to satisfy the trial court that the same was indeed the same impounded in the alleged search conducted at the appellant's house.*
- VI. *That, the bullet allegedly impounded in the search conducted at the appellant's house was not exhibited in evidence in court.*
- VII. *That, the learned trial magistrate erred in fact and law to rely on assumption that because the appellant admitted that he was, in the past, owning a gun which he surrendered before the police, is a justification for possessing the bullet.*

Wherefore, the appellant prayed to this Court to allow the appeal, quash the conviction, set aside the sentence, and order for the appellant's release from prison custody.

When the matter was called on for hearing the appellant was self-represented whereas Mr. Joseph Makene, Senior State Attorney and Ms. Tunosye Luketa learned State Attorney appeared for Republic.

The appellant prayed to this court to adopt the grounds of appeal to form part of his submission.

In rebuttal, the learned State Attorney was in full support of the conviction and sentence. He submitted that the two counts were proved beyond reasonable doubt since the appellant had the knowledge. She stated that the illegal trophies were in his possession and he had no permit to own them. According to the evidence of PW1, Emmanuel Kihumbi a police officer found the appellant with the government trophies. He had the knowledge and possessed them.

She submitted that this was also corroborated by PW2, E 8442 DCPL Amosi, a police officer that the accused was found with the bullet. She further contended that PW3 Khatibu Mwangela, a game officer who made a valuation identified the items. The case was proved and the accused had no justification for why he possessed the said items.

She further informed the court that although there were contradictions in terms of dates on the charge sheet 17/12/2018 and the witnesses stated 15/12/ 2018, this contradiction is curable by Section 234 (3) of Criminal Procedure Act, Cap 20 [R.E 2022] since it does not go to the root of the case.

As to the issue of an independent witness, she submitted that PW1 asked the accused about neighbours however he told them that he was living in an isolated place. Hence no neighbourhood.



Furthermore, she admitted that the certificate of the seizure(P1) which was tendered was not read before the accused, however, she quickly stated that even if it is expunged from the record, all witnesses testified to the court on the items he was found. In the case of **Emmanuel Masanja V R**, Criminal Appeal 394 of 2020 on page 11,

*“The submission by the learned Senior State Attorney is that, though the exhibit was expunged from the record, the first appellate court was right in relying on the oral account of PW4 to uphold the conviction. Reference was made to the case of **Khamis Samwel v. R**, Criminal Appeal No. 320 of 2010 (unreported).*

The learned counsel prayed to this court to dismiss the appeal since it has no merit.

In rejoinder, the appellant reiterated his submission in chief that the property does not belong to him.

I have had an occasion to canvass the rival submissions as well as the record of appeal.

On the first ground of appeal, whether the prosecution proved its case beyond all reasonable doubts. This issue will be disposed of by addressing the grounds of appeal and the evidence on record.

From the outset, I agree with the learned State Attorney that, the two offence were proved since there is evidence from the prosecution

witnesses proving that the appellant was found in possession of government trophies and a bullet. As for the first and second counts, the prosecution evidence which implicates the appellant in the charged offence, is extracted from PW1 and PW3. The police and game officers averred that the appellant was found at Mwanamkola sublet, Sikonge District within Tabora region in possession of ammunition to wit one bullet of a shotgun without a lawful permit, and government trophies. They also testified how the accused was caught with those items. The said weapons were admitted as Exhibit P1 and P2 collectively. The appellants failed to show the relevant permits as required by the law. Therefore, I find that evidence of PW1, PW2 and PW3, and PW4 was direct. Likewise, Exhibit P1 and P2 implicated the appellant in the first and second counts. Hence, the appellant's argument that the court admitted the wrong exhibit lacks merit.

I now move to the second ground of appeal in respect of the independent witness. There is no dispute that there was no independent witness. According to the prosecution evidence, the appellant was living in an isolated area and when he was asked he stated that he had no neighbourhood. I subscribe with the State Attorney that it was unlikely to find an independent witness, nonetheless, I found doubt to trust them directly since the appellant called his wife, DW2, Mwajuma Simba who testified that when the police came they directed her to give a shirt for



his husband. Although it is trite law that the witnesses must be trusted unless there is a reason to question their credibility. In **Goodluck Kyando v R**[2006] TLR 363 and Edison **Simon Mwombeki v R**, Criminal Appeal No.2016.

The issue of whether a witness is competent or not is in the domain of the trial court. This position was stated in **Popart Emanuel vs R**, Criminal Appeal No 200 of 2010, CAT at Iringa (Unreported) when the Court of Appeal held that:

*"As regards to the reliance of evidence from one office, we know of no law which imposes restriction...The three police officers were competent to testify. The question of whether they had said true or not was the domain of the trial Court." In this case, PW1 and PW2 were found to be competent witnesses. They are not barred from giving evidence only because they come from the same office. The appellants were required to challenge or cross-examine and shake their credibility.*

From the above excerpt, it is settled law that during search and seizure, there should be an independent witness. I understand that a court being a court of law cannot be blind in respect of this issue simply because the said certificate of seizure was signed. The law provides that, during search and seizure, there should be an independent witness. The rationale behind having an independent witness is to provide

independent evidence, as was emphasized in the case of **Jibril Okash Ahmed Vs. Republic**, Criminal Appeal No. 331 of 2017; CAT (unreported). In the case of **Shaban Said Kindamba vs Republic**, Criminal Appeal No. 390 of 2019 at page 18 the Court of Appeal also emphasized that;

*"We are inclined to take it as logical that an independent witness to a search must be credible, or the whole exercise would be rendered suspect..." In the instant matter, the certificate of search and seizure was signed by Rajabu Semuye, who was the complainant. I am of the considered opinion that the complainant could not be an independent witness. Therefore, since the said certificate of seizure was not signed by an independent witness, then the trial magistrate erred in law in relying on it in convicting the appellants."*

Guided by the above authority, it is my considered view that since the evidence shows that PW1 and PW3 were on the same operation which was to arrest a suspect of government trophy therefore, they could not have been a credible and impartial witness in the search and seizure exercise as they were one of the arresting officers, thus having an interest in the matter. I find this ground has merit.

As to the fourth ground of appeal that there was a break of a chain of custody of the government trophies allegedly impounded from the appellant in the search conducted on 17/12/2018 at his house.

In his evidence PW3, the game officer testified that he received a letter from the Regional Investigation Officer requiring him to identify and make an evaluation of the trophies.

It is trite law that the chain of custody is established where there is proper documentation of the chronology of events in the handling of exhibits from seizure, control and transfer until tendering in court at the trial. See for instance **Paulo Maduka and Four Others v. R**, Criminal Appeal No. 110 of 2007; **Makoye Samwel @ 15 Kashinje and Kashindy Bundala v. R**, Criminal Appeal No. 32 of 2014; and **Abas Kondo Gede v. R**, Criminal Appeal No. 472 of 2017 (all unreported).

In the instant case, I noted that the chain of custody of exhibits P1 and P2 was not established because there was no documentation to that effect as required under PGO 229 paragraph 15.

It is my considered view that there was no proper documentation in respect of exhibits P1 and P2. I am also aware that the chain of custody can be established by the oral account of witnesses as held in the court of appeal decisions. Though, in the instant appeal, the chain of custody was broken from the very beginning when the appellant was searched and alleged items seized in the absence of an independent witness. It is this initial stage of the process which would have set in motion the chain of custody if it was done to the dictates of the law. Therefore, even

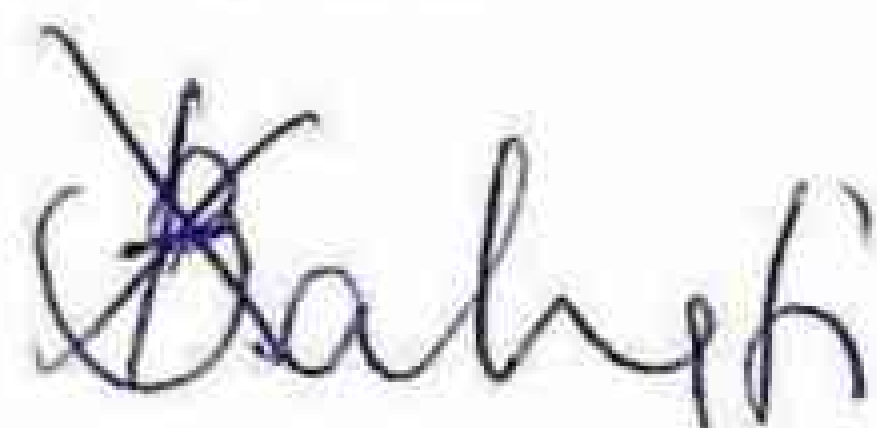


if the exhibit was properly handled when it left the hands of PW3, the exercise lacked credibility because it was doubtful that exhibits P1 and P2 were searched and seized from the appellant. This is one of the stages in which the authorized officers are supposed to comply to establish the chain of custody which casts doubt from the very beginning of the search and seizure.

As to the sixth ground, the bullet allegedly impounded in the search conducted at the appellant's house was not exhibited in evidence in court. The appellant complained that the alleged bullet ought to be brought and tendered as an exhibit. I generally accept the assertion of the appellant as far as the need for tendering exhibit is concerned. Having keenly traversed through the court records, I have noted that the bullet was tendered collectively and admitted as exhibit P2.

Therefore from the foregoing analysis, I am satisfied that this appeal has merit. Based on the above reasons I allow this appeal. Therefore, a conviction against the appellant is hereby quashed and the sentence set aside. I hereby order the release of the appellant from custody immediately, unless held for other lawful reasons.

Order accordingly.



**A. BAHATI SALEMA**

**JUDGE**

**17/2/2023**





**Court:** Judgment delivered in presence of both parties.

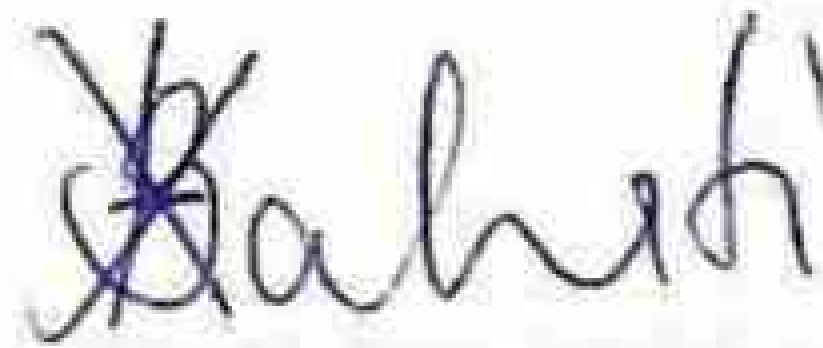


**A. BAHATI SALEMA**

**JUDGE**

**17/2/2023**

Right to Appeal is hereby explained.



**A. BAHATI SALEMA**

**JUDGE**

**17/2/2022**

