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

**AT SUMBAWANGA**

**DC. CRIMINAL APPEAL NO. 33 OF 2022**

**(Appeal from the decision of the District Court of Mlele at Mlele in Economic Case No. 08 of 2008 dated 11.04.2022)**

**PASCAL S/O SAVERI@ MTUKA ..... APPELLANT**

**VERSUS**

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

**JUDGMENT**

*13th February, 2023*
*20th March, 2023*

**Mrisha, J.**

This is an appeal against the decision of the District Court of Mlele at Mlele (the **trial court**) in which the appellant Paschal s/o Saveri@Mtuka was convicted and sentenced to serve a custodial penalty of twenty years in jail on each count. The trial court ordered the sentences to run concurrently.

The first count is Unlawful possession of firearm contrary to section 20(1) (b) and (2) of the Firearms and Ammunitions Control Act No. 02 of

2015 (**the FACA**), read together with paragraph 31 of the first schedule to and sections 57(1) and 60(2) of the Economic and Organized Crimes Control Act CAP 200 R.E. 2019 (**the EOCCA**).The second count is Unlawful possession of ammunitions contrary to section 21(b) of the FACA, read together with paragraph 31 of the first schedule to and sections 57(1) and 60(2) of the EOCCA.

Before the trial court it was alleged by the Republic, with respect to the above first count, that on the 11th day of April, 2021 at Ilalangulu Village within Mlele District in Katavi Region, the appellant was found in possession of two (2) muzzle loading guns commonly known as "Gobore" without any permit from Authorized officer.

On the second count, it was the allegation by the prosecuting Republic that on the same date and place as mentioned in the first count, the appellant was found in possession of one hundred and thirty-one (131) ammunitions used in muzzle loading gun commonly known as "Gobore" without any permit from Authorized officer.

The appellant pleaded not guilty to all the two counts. This necessitated the prosecution to bring a number of six prosecution witnesses (PWs) and tendered four exhibits with a view of discharging their legal duty of

proving their case against the accused person without any reasonable doubts.

For the ease of reference, I will describe the names of prosecution witnesses and the exhibits tendered, just like I will soon do so with respect to the defence side. The prosecution witnesses, who testified before the trial court, were A/Insp. Thomas Emmanuel Masola (PW1), F.6408 D/CPL Richard (PW2), H.1874 D/C Florence (PW3) and H. 1625 D/CPL Rashid (PW4). The rest were Shabir Bashiri (PW5) and Yohana Massali (PW6).

Regarding exhibits, the respondent Republic intended to produce four exhibits in the trial court, but among them the one, which was the alleged caution statement of the appellant, was rejected on the ground that the same was recorded by PW2 out of time, which is contrary to the requirement of the law as per section 50(1) and (2) of the Criminal Procedure Act, CAP 20 R.E. 2019(the **CPA**).

Consequently, the documents which were cleared for admission as exhibits were three, namely search order (exhibit P1), 2 muzzle loader guns, 5 ammunitions (iron bar pieces), 126 small iron balls, gun powder, "chola", 4 fataki, 1 piece of iron and 6 sabots (exhibit P2) and a chain of custody (exhibit P3). The records of the trial court reveal that the

defence side had only one witness; the appellant herein, and no exhibit was tendered by that side.

The brief facts leading to conviction and sentence of the appellant are that before the arrest and arraignment of the appellant the Park Rangers of Katavi National Park including PW5 were tipped by their informer that the appellant was possessing firearms. Thereafter, this information was aired to the police who thereafter arrested the appellant and after interrogating him he confessed to be in possession of the alleged firearms and ammunitions which he said he had hidden in the Wildlife Management Area (WMA).

Following such confession of the appellant, the police officers including PW1, the Park Rangers including PW5, and PW6 who is the village leader of Ilalangulu village, were led by the appellant to the WMA which is within the same village, and upon reaching there the appellant showed them the ammunitions and two muzzle loading guns which he had hidden beneath the fallen tree and had put some tree glasses on top of them. He was then found in possession of two muzzle loading guns and ammunitions without a permit.

Thereafter, prepared a search order and proceeded to seize the said ammunitions and two muzzle loading guns. Then the appellant was

matched to Kibaoni Police post together with the seized items. After interrogation the appellant confessed; then he was taken before the trial court where he was charged with two counts as described above.

After a full trial, the trial court found him guilty of two counts and it convicted and sentences him just as indicated above. Aggrieved by both the conviction and sentence the appellant has filed the instant appeal which comprises of five (5) grounds which are: -

1. That the trial court erred at law by convicting the appellant for the offence of unlawful possession of firearms and ammunitions which were seized in contravention of the law governing the same as no receipt were issued, no copy of the report was produced to the trial magistrate after conducting search and seizing of the said items,
2. That the trial court erred at law by convicting the appellant and working upon the seizure certificate which contents were not read before the appellant was called to sign,
3. That the trial court erred at law by convicting the appellant with the offence of unlawful possession of firearms and ammunition which were not found and seized from him,

4. That, the trial court erred at law by holding that the appellant confessed to possess the muzzle loading gun without producing any proof in the form of caution statement, and
5. That the trial court erred at law by convicting the appellant on a case that was not proved beyond reasonable doubt.

At the hearing of this appeal the appellant was present, legally unrepresented, whereas the Respondent Republic was represented by Ms. Safi Kashindi, Learned State Attorney. The appellant took off his journey of fighting for his liberty by requesting this court to adopt his grounds of appeal and set him free. He finally attempted to convince this court to accept his appeal as all his grounds of appeal are self-explanatory and well prepared; hence he does not have more explanation.

On the other side of the coin, Ms. Safi Kashindi supported both the conviction and sentence passed by the trial court. She submitted on the first ground of appeal raised by the appellant that failure issue receipt to the accused person after seizing items found in unlawful possession, is a minor error which cannot cause the prosecution case to flop.

She added that such anomaly was rectified by the evidence of PW1 and PW6 whose evidence clearly reveals the contents of seizure certificate

by showing how the appellant showed them the items and how the same were seized by PW1. She also added that the whole event of searching and seizing of the items was witnessed not only by the police and park rangers, but also by PW6 who was an independent witness.

She said the evidence of PW1 and PW6 is available at pages 19-22 and 49-50 of the trial court's proceedings. Finally, on the first ground, the learned State Attorney cited the case of **Andius George Songoloka and 2 Others vs. DPP**, Cr. Appeal No.373 in which the Court of Appeal cited with approval the case of **Nyerere Nyague v. R.**, Criminal Appeal No.67/2020(Unreported) and state that,

> *"It is not therefore correct to take that every apparent contravention of the provision of the CPA automatically leads to the exclusion of the evidence in question".*

Submitting on the second ground of appeal, M/s Safi Kashindi argued that the certificate of seizure which was tendered by PW1 was duly admitted as Exhibit P1 and its contents were read over, hence the second ground of appeal has not merit.

As for the third ground of appeal, the learned counsel submitted that the prosecution evidence is clear that the firearms and ammunitions were found with the appellant. She added that at pages 19-22 of the trial

court's proceedings PW1 stated that the appellant confessed and directed the policemen and other witnesses, including an independent witness, to a place where he had kept the firearms and ammunitions. She concluded by faulting the appellant's stance that the said items were not found with him.

Turning to the appellant's fourth ground of appeal, the learned State Attorned submitted that the weight of prosecution's evidence is based on the appellant's confession which led to the discovery of firearms and ammunitions. She added that the appellant confessed before PW1 and PW6 and led them together with other people to the place where the alleged items were discovered.

She cited section 31 of the Evidence Act, CAP 6 R.E. 2019 (**the TEA**) and argued that the said law is clear that the confession which leads to discovery of exhibit is relevant/s Safi Kashindi went on to argue that although the appellant's caution statement was expunged from record by the trial court due none compliance with the relevant law, yet the appellant's confession led to discovery of the exhibits which were tendered in court. To fortify her submission, she cited the case of **Michael Mgolowe and Another v. R.**, Criminal Appeal No. 205 of 2017 at page 28 in which the Court of Appeal of Tanzania explained the

application of section 31 of the TEA. She concluded by saying even if the said caution statement was not admitted by the trial court, yet the statement made by the appellant led to discovery of the firearms and ammunitions.

Lastly, on the fifth ground, the learned State Attorney submitted before this court that the prosecution side proved its case beyond reasonable doubt; she added that it is the appellant himself who directed the police officers, park rangers and the Village Executive Officer to the place where the exhibits were kept. Having said all the above the learned State Attorney submitted that the appeal lodged by the appellant has no legs to stand, thus she prayed that the same be dismissed.

On rejoinder, the appellant told this court that he heard all the submissions made by the prosecuting Attorney, but he had nothing to add rather than reiterating his pray to this court to consider his grounds of appeal and set him free.

Having heard all the submissions by both parties in this case, I commend them for their cordial cooperation to this court; their efforts in submitting their cases have enabled this court to get a picture of what really transpired during the hearing of an original economic case against

the appellant. I will now begin to determine whether the appellant's appeal is meritorious.

Having gone through the grounds of appeal as raised by the appellant, I have noted that the same can be reduced into almost four points which needs to be addressed by this court as it determines the above main issue. They are, **One**, failure by the police officer (PW1) to issue receipt to the appellant after conducting search and seizing the alleged firearms and ammunitions which are exhibits P2 and P3. **Two** that the contents of the seizure certificate were not read over before the accused was called to sign on it. **Three**, that the said seized firearms and ammunitions were not found in possession of the appellant, and the **fourth** complaint, which I think it consolidates the fourth and fifth grounds of appeal, is that the prosecution case was not proved beyond any reasonable doubts.

On the first point M/s Safi Kashindi, while conceding that it was an error by PW1 not to issue receipts of seized items to the appellant, submitted that such error is normal as it does not go to the root of the prosecution's case. According to her, that is because the appellant's confession before PW1 and PW6 led to discovery of the firearms and ammunitions. She cited the cases of **Andius George Songoloka** and

**Nyerere Nyague (supra)** to fortify her stance. As it was stated earlier, the appellant had nothing more rather that pleasing this court to consider all his grounds of appeal.

I have read all the above cases referred by the learned counsel and I agree with her that it not automatic that every apparent contravention of the provision of CPA can lead to the exclusion of the evidence in question. However, I think such principle of the law applies when the anomaly occurred does not go to the root of the prosecution's case.

At this juncture, one may ask did the omission by PW1 to issue receipts of the seized items go to the root of the prosecution's case? I think the answer to that question is in the affirmative. The law is very clear that a police officer who seize items suspected to be used by the suspect to commit an offence or to endanger the life of people or other properties, is duty bound to issue receipt to the suspect. See section 38(3) of the CPA which mandates such police officer to do so.

The purpose of issuing receipts in such circumstance is **first**, to ensure that such items were found from no other person, but the suspect or the owner of the searched premises, and, **second**, is to omit the unnecessary complaints by the suspect, like in this case the appellant,

that the documentary evidence (seized items) might have been fabricated.

I am fortified in this view by referring the case of **Selemani Abdallah and Others vs R**, Criminal Appeal No. 384 of 2008 in which the Court of Appeal stressed that,*" ... The whole purpose of issuing a receipt to the seized items and obtaining signatures of witnesses is to make sure that the property seized came from no place other than the one shown therein. If the procedure is observed or followed, the complaints normally expressed by suspects that evidence arising from such search is fabricated will to a great extent be minimized".*

In the instant case, it is not in dispute that there was such procedural omission. This is justified not only by the submission of the counsel for the respondent Republic, but also by the evidence of PW1 whose evidence on trial courts record does not show if he issued a receipt or even a copy of the seizure certificate to the appellant after he had completed the process of seizing the items (exhibit P2) alleged to have been found in possession of the appeal.

Hence, with all due respect, I differ with the submission of the respondent's counsel, and I hold that the first ground of appeal by the appellant has merit.

The second point which originates from the appellant's second ground of appeal cannot consume my time in addressing it. Despite the fact that the complaint by the appellant that the contents of exhibit P1 (seizure certificate) were not read to him, the trial court's records are loud on that and I wish to quote a part of it as hereunder: -

***"Court: Contents of Exhibit P.I read over aloud by PW 1 before the court..."***

All that indicates that all the steps of admitting such document were followed by the trial court, as pointed out by M/s Safi Kashindi, learned State Attorney. Hence, the appellant's complaint in that respect is not correct and his second ground of appeal is dismissed for want of merit.

Next for determination is the third point which I think can also be addressed together with the fourth point above. This is because the two points revolve around the alleged confession of the appellant leading to discovery of the firearms and ammunitions.

According to the respondent's counsel the appellant was actually found in unlawful possession of the alleged firearms and ammunitions due to the evidence of PW1 which is to the effect that the appellant confessed to PW1 and directed the police and the independent witness to the wildlife management area where he kept such items.

She also cited section 31 of TEA and the case of **Michael Mgolowe** (supra) to argue that although the appellant's caution statement was expunged from record by the trial court due none compliance with the relevant law, yet the appellant's confession led to discovery of the exhibits which were tendered in court.

From the above submissions by the respondent's counsel, it appears that she wants to convince this court to believe that the prosecution side had properly proved its case without leaving any shadow of reasonable doubt and that the appellant's complaints that he was not found with unlawful possession of firearms and ammunitions are afterthoughts.

The cardinal principal of our criminal law is that the one who alleges existence of a certain fact must prove its existence. This can be ascertained from the provisions of the TEA as well as the caselaw. Section *10(1) of TEA provides that,*

*"...**Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist**..." (emphasis added)*

In the case of **Mohamed Haruna@ Mtupeni & Another vs. Republic**, Cr. Appeal No.25 of 2007(unreported) where the Court of Appeal held,

***"…. the burden is always on the prosecution. The standard has always been proof beyond a reasonable doubt."*** *(emphasis added)*

In the instant case the duty of the prosecution side before the trial court was to prove all the ingredients of offences which the appellant stood charged. In the first count, the prosecution side was supposed to prove beyond any reasonable doubt first, that he was found with unlawful possession of firearms and, two that he had no permit from an authorised officer. I think possession is first ingredient, and the need to prove the same is inevitable before one jump to the second ingredient. In order to prove the first ingredient, the prosecution has to prove, among other things, that after seizing the alleged items the authorised police officer issued a receipt to the appellant, as required under section 38(3) of the CPA which provides a mandatory requirement in that respect. It follows, therefore, that where an authorised police officer omits to issue a receipt to the suspect after seizing the alleged items, like it happened in this case, then it is hard to prove possession on the part of the suspect.

The receipt is very important document as it helps to acknowledge the seizure of the items alleged to be found with the suspect; see the case of **Selemani Abdallah** (supra). In the absence of a receipt, the need to

prove the second ingredient cannot help the prosecution side to build their case. Such legal duty was required to be exercised by the prosecution side even in proving the second count; hence I need not to go further on that.

Therefore, after addressing of the above points and considering the circumstances of this case, it appears to me that the prosecution side had failed to prove its case against the appellant to the standard required by the law, due to the following reasons, which I think are enough to dispose of this appeal: -

**One**, the prosecution failed to prove that the appellant was found in possession of the firearms and ammunitions (exhibit P1) because the appellant was not availed with a receipt after the same were seized by PW1.That was conceded by the respondent's counsel when submitting before this court, and such omission leaves a reasonable doubt whether the appellant was found with actual or constructive possession of the alleged items.

**Two**, the prosecution evidence is in itself self-contradictory, though somehow convincing, and the trial court magistrate seems to have fallen on that trap. I will clarify on that. First, in the trial court proceedings especially at page 20, PW1 is partly quoted to have said,

*"...Thereafter, I prepared a search order, I seized the items. I was the one who signed the order; it was also signed by accused, Hamlet leader and Bashiri Kahamba. I took the accused and the seized items to Kibaoni police Post..."*

The above excerpt does not show anywhere if after seizing the alleged items and preparing a certificate of seizure (if at all he had done so, though he did not say that), PW1 issued a receipt to the appellant as an acknowledgement that the seized items (exhibit P2) were actually seized from the appellant.

But on the other hand, at page 7 of the impugned trial court's judgment, the trial magistrate is quoted to have written something which is rather different from what PW1 said in his testimony; he wrote this,

*"...it is when PW1 went on to seize the exhibit P2 by preparing and* ***issuing a receipt of such seizure****. Exhibit P1 (Certificate of seizure) reveals a clear acknowledgement by accused on the seizure of Exhibit P2. It is undoubted from such piece of evidence that indeed exhibit P2 was seized from the accused."*

At this juncture, it is evident that PW1 did not issue any receipt to the appellant in order to capture his acknowledgement regarding the seized items. It is the view of this court that had the trial magistrate noted such

a serious discrepancy; he would have arrived at a different conclusion. On that note, I find the appellant's complaint to be nothing, but true.

**Three**, if that is not enough; I noted something very confusing in the course of composing this judgement. The trial court records at page 21, shows that what PW1 prayed to tender in court as an exhibit was a *"Search Order"*, and the trial court admitted the same as such, but at page 7 of the impugned judgment, the trial court seems to term exhibit P1 as a *"Certificate of seizure"*. I don't think if that was proper, because it is obvious that the two are different phrases, and they have different meanings. Again, that leaves a reasonable doubt on the allegations levelled against the appellant in this case.

**Four**, I am all aware that under section 31 of TEA the confession which leads to discovery of a certain information (exhibit) whether relevant or not, is admissible in evidence. This position of the law finds its way in a number of cases including the case of **Michael Mgolowe** (supra) which was cited by the respondent's counsel. However, in my view, such authorities are distinguishable with the case at hand.

In the instant case the appellant's alleged confession which was reduced into writing through a caution statement, is not part of the trial court's record. The only evidence available in relation to that aspect is the oral

testimony of PW1 and PW6 as pointed out by Ms. Safi Kashindi, learned counsel. However, such evidence is tainted by some reasonable doubts, as indicated above. Thus, in my view the same cannot be used to rectify and/or reveal the contents of the expunged documentary evidence.

**Five**, although there is evidence of PW1 and PW6 that the appellant confessed to possess the said items which confession led to the discovery of such items, yet such evidence was not enough to ground convictions against the accused person (now the appellant). This is because the appellant's caution statement was expunged from record by the trial court; hence it was wrong for the respondent's counsel to rely on a confession which was not part of trial court's record.

**Six**, the prevailing circumstances of the trial court proceedings show that two weeks before the appellant's apprehension, PW5 who is a Park ranger, was tipped by his informer that the appellant was in possession of firearms, then he reported the matter to PW1 of Kibaoni Police Post; This is evidenced by PW5's evidence and his answer to one of the appellant's cross examination questions. (See pages 45 & 47 of the typed trial court's proceedings).

However, neither PW5 nor PW1 gave sufficient reasons why they stayed that longer without tracing and finally arresting the appellant with the

aid of their informer, until when he paid visit to the police Post of Kibaoni to make a follow-up about his relative's case who was assaulted. All that raises a reasonable doubt on the part of the prosecution case, and I think the appellant's complaints that he was not found with unlawful possession of the alleged items, and that the prosecution had failed to prove its case against him, are true. This is so because under such circumstance any one may hold that the informer might have implicated the appellant for the reasons best known to him.

Having said the above, I find and hold that the appellant's appeal is meritorious. The same is allowed to the extent stated above. Consequently, I further order for the appellant's immediate release from custody unless held for some other lawful course.

**Dated** at **Sumbawanga** this 20th **Day of March, 2023.**

**A.A MRISHA**
**JUDGE**
**20/03/2023**

**Court**: Judgement delivered in presence of John Kabengula for the Respondent Republic, and the Appellant himself.

**A.A MRISHA**
**JUDGE**
**20/03/2023**

Right of appeal is fully explained.

A.A MRISHA
JUDGE
20/03/2023