IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 39 OF 2022

(Originating from the District Court of Mlele at Inyonga in Economic Case No. 12/2020)

SHABAN MOHAMED.....APPLICANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

02/01/2023 & 27/03/2023

MWENEMPAZI, J.

The appellant in this matter was arraigned before the District Court of Mlele at Inyonga for three counts, **first** it was unlawful possession of fire arm contrary to section 20(1)(b) and (2) of the Fire Arms and Ammunition Act No. 2 of 2015 read together with paragraph 31 of the first schedule to, and section 57(1) and 60(2 both of the Economic and Organized Crime Control Act [CAP. 200 R.E 2019]. **Second,** unlawful possession of Ammunition contrary to section 21(b) of the Fire Arms and Ammunition Act No. 2 of 2015 read together with paragraph 31 of First Schedule to, and section 57(1) and 60(2) both of Economic and Organized Crime Control Act [CAP. 200 R. E. 2019], and **third** is unlawful possession of government trophy contrary to section 86(1) and

(2)(b) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 of the first Schedule to, section 57 (1) and 60 (2) of the Economic and Organized Crime Control Act [CAP. 200 R. E. 2002] as amended by section 16 (a) and 13 (b) of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2016.

It is the prosecution side's case that on the 15th day of May, 2020 at Ikuba village within Mlele District in Katavi Region, the appellant was found in possession of one Muzzle loading gun commonly known as "Gobore" without licence, he was also found in possession of eleven (11) ammunition of muzzle loading gun too without license and last but not least, he was found in possession of ten (10) kilograms of Buffalo meat valued at USD 1900 which is equivalent to Tshs. 4,392,800/= only, the property of the United Republic of Tanzania without a permit from the Director of Wildlife.

As the charges were read before the appellant, he pleaded not guilty to all three counts, and however at the end of a full trial, the trial found the appellant not guilty on the second and third count but did find him guilty on the first count and hence convicted him of that very count whereas he was sentenced to serve a term in prison of twenty (20) years.

Aggrieved by that decision, the appellant constructed six (6) grounds of appeal which I find best to reproduce hereunder as follows;

1. That, the trial court erred in law, point and fact by convicting and

sentencing the appellant for case which was not proved beyond all reasonable doubts as required by standard law.

2. That, the trial court erred in law, point and fact by convicting and sentencing the appellant without considering that there was no any independent witness who witnessed the appellant being found with the said items.
3. That, the trial magistrate misdirected himself by convicting and sentencing the appellant relying on the prosecution side while mis observed that no certificate of seizure was tendered before the trial court to prove that the appellant was searched and found with the said firearm as alleged by the prosecution side.
4. That, the trial court erred in law, point and fact by passing a sentence to the appellant basing on contradictory evidence for the prosecution's evidence, that the prosecution side failed to call one Faustine s/o Shabani who alleged to be at that time of signing searching order, in order to prove same, something which brings doubts in the eye of the law.
5. That, the trial magistrate erred in law, point and fact by convicting and sentencing the appellant relying on the prosecution's evidence while mis observed that the search was conducted during the night without authorized search warrant.
6. That, the trial court total erred in law, point and fact in convicting and

sentencing the appellant without considering the defence adduced by the appellant and indeed drew a nullity conviction for the appellant.

In that, the appellant herein, prays for this court to allow this appeal and quash the conviction and set aside the sentence imposed on him by the trial court and that the appellant be set at liberty by being released from prison.

In the date scheduled for hearing, the appellant herein had legal representation while the respondent was represented by Mr. John Kabengula learned State Attorney. However, as the appellant appeared to be seriously struggling with his health, both sides agreed to dispose this appeal by way of written submissions, and this court gladly granted the option to the parties.

The appellant started off by generally submitting for the grounds of appeal as he filed to this court. The appellant submitted that he was convicted and sentenced over the charges which were not proved to the required standard of law as he was not afforded the chance to cross examine against the testimonies tendered by the prosecution side before the court something which he believes it brings doubts in the eye of the law, in support of his argument, he referred this court to section 206 of the Criminal Procedure Act CAP 20 R.E 2022 and cited the case of **Bhatt vs Republic** (1957) E.A 332.

He submitted further that he was convicted and sentenced while his defence was not considered as he testified before the court that on that

material night, he saw park rangers entering his house with a muzzle loader gun and wild animal meat.

He therefore prayed for this court to allow his appeal and quash the conviction and set aside the sentence imposed on him, furthermore he be released from prison and be set at liberty as he was not found with the listed items as alleged.

In response to the submission made by the appellant, Mr. Kabengula firstly submitted that, they do not support the appeal as the appellant was rightly convicted and sentenced by the trial court of Mlele.

He argued that, considering the appellant's second ground of appeal as filed by the appellant, Mr. Kabengula submitted that this ground is baseless as according to the trial court's record on page 29, during his arrest, search and seizure; one PW3 Rehema Godwin, the Village Executive Officer of Ikuba village was present during the whole process of searching the residence of the suspect till when the muzzle loading gun was recovered. He added that, the witness even did sign the certificate of seizure as reflected in Exhibit P4 tendered by PW5 one H.265 PC Agripa as per the trial court's proceedings at page 41 on 22nd line, and therefore Mr. Kabengula prayed for this ground to be dismissed.

The learned State Attorney submitted further that on the ground that there was no certificate of seizure upon which his conviction and sentence were

grounded, his side does not join hands with this very ground as according to court record, the certificate of seizure are tendered in court and admitted as Exhibit P4 by PW4 and that the trial court's record at page 41 establishes the same.

In addition to that, Mr. Kabengula submitted that there are plenty of evidence proving that the muzzle loading gun was seized from him, which includes oral testimony of PW3 Rehema Godwin who saw the police officers recovering the muzzle loading gun from the appellant's house. He added that at page 30 of the trial court record from the 6th to 9th lines PW3 testified as thus, ".....inside his bedroom we found his wife, we awoke her so that we could search under the mat which his wife slept on, we found a weapon which was wrapped by a cloth. That, the weapon was a "gobore" and the said items were seized by H.246 PC Agripa, whereas the oral testimony of the seized muzzle loading gun is also reflected in the testimony of PW4 one Amon Mtonya as per trial court records at page 35 from the 14th to 17th lines.

Submitting against the fourth ground of appeal, Mr. Kabengula submitted that all witnesses who testified with respect to the recovery of muzzle loading gun were credible and their testimonies were not shaken. The learned State Attorney gave examples of the testimonies from PW3 and PW4 who witnessed the muzzle loading gun being recovered from the appellant's room. The learned state attorney cited the Court of Appeal case in **Goodluck Kyando vs**

Republic, [2006] TLR 363 which held that every witness is entitled to credence unless there are good and cogent reasons to the contrary.

In addition to that, Mr. Kabengula submitted that the appellant as argued that Faustine s/o Shaban could have been summoned as a witness to the search, in which, the learned State Attorney insisted that in proving a criminal case there is no fixed number of witnesses required to prove the case as his arguments are backed by section 143 of the Tanzania Evidence Act Cap. 6 R.E. 2022.

In the fifth ground, Mr. Kabengula submitted against it that, it is baseless as circumstances of the incident made it to be conducted at night hours, and that had the team waited for the search to be conducted during the day hours, there were possibilities of the appellant to temper with the exhibit and nevertheless the appellant was never prejudiced by the operation as he was cooperative.

The learned State Attorney proceeded to submit against the sixth ground of appeal that, the trial court did consider the defence case and the that the same is exhibited on page 05 of the typed judgement. He added that, while disposing the first issues at pages 09 to 10 of the typed judgement, the trial magistrate did consider the appellant's defence.

Winding up, Mr. Kabengula submitted that the case against the appellant was proved to the required standard of the law as the evidence adduced on

grounds two to six that PW3 and PW4 were all eye witnesses who witnessed the muzzle loading gun being recovered from the appellant's room, and that even exhibits P4 and P5, all prove that the appellant was possessing a firearm without a permit. The learned State Attorney, therefore prayed for this ground too to be dismissed, and in turn, this entire appeal be dismissed as all the grounds as filed by the appellant are outweighed by the strong proven evidence of the prosecution side.

After the submissions from both camps were complete, I keenly read the entire trial court's record, the grounds of appeal and the above submissions of both sides, and in doing so, I am fortified that the only major issue to be delt with in resolving this appeal is ***whether this appeal is meritious before this court.***

Before taking off, I should make it clear that this court being the first appellate court, has powers to step into the trial court's shoes and reconsider the evidence of both sides and come up with its own finding of fact as it was the holding in the case of **Kaimu Said vs Republic, Criminal Appeal No. 391 of 2019** CAT Mtwara (unreported).

Beginning with the 5th ground of appeal as filed by the appellant that, ***the trial magistrate erred in law, point and fact by convicting and sentencing the appellant relying on the prosecution's evidence while mis observed that the search was conducted during the night without***

authorized search warrant. It was the Appellant's contention that the search conducted by the arresting officers in company of the park rangers was unlawful since the same was conducted during the night without search warrant. On the other hand, the learned State Attorney for the Respondent argued that, the circumstances of the incident made it to be conducted at night hours, and that had the arresting team waited for the search to be conducted during the day hours, there were possibilities of the appellant to temper with the exhibit, and that nevertheless the appellant was never prejudiced by the operation as he was cooperative.

From the parties' arguments, I will be guided by the provisions of the law that provide for search. **Section 38 (1) of the CPA** provides that:

> *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.

The above provision of the law is read together with **paragraph 1 (a), (b) and (c) and 2 (a) and (d) of the Police General Orders No. 226.**

From the records, there is testimony of PW4 who stated that he was phoned by an informer that at Ikuba Village there is a person known as Shaban s/o Mohamed who is selling wild meat. They then went to Usevya Police Post and they obtained company from acting OCS known as PC Agripa. PW4 stated that they informed the said OCS that they are intending to conduct search at the residence of Shaban s/o Mohamed at Ikuba Village. PC Agripa then suggested that they should also see the Village Executive Officer.

PW3 & PW5 in their testimonies, they both testified the same that on 15/05/2020 at night, PW4 informed them each at a time that they are intending to conduct search at the residence of the appellant herein, that an informer has informed them that the appellant is selling wild meat. It is from this search that the said firearm, 6 pieces of iron bar, 5 iron balls and purported gun powder were discovered allegedly being in possession of the appellant.

Meanwhile, during the trial the appellant in his defence did admit that he did invite people who introduced themselves as police officers and park rangers

who were being accompanied by the village executive officer, and they wanted to search him as they suspected him to possess a wild meat illegally. In his testimony, he added that the officers entered his house with the said meat and the muzzle loader gun and that the tortured him so that he admits that they retrieved the properties from his residence, out of torture he had to admit that the properties were his, but the truth is, they were planted.

From the looks of it, the search was not at all an emergency one. When PW4 was informed about the appellant's suspected action of selling wild meat, he had time to arrange the seizure by alerting and acquiring assistance of the police officers and an independent witness the village executive officer. In his testimony, there is no anywhere that he stated the search to be an emergency one and that is why he had time to arrange for the search of the appellant's residence. It is from such evidence of PW4 I believe there was time to secure a search warrant or a written authority to allow him and his colleagues to conduct the search as required by law.

I am in contrast with the Prosecution that the search warrant was not mandatory in the said circumstance as the incident made it to be conducted at night hours, and that had the arresting team waited for the search to be conducted during the day hours, there were possibilities of the appellant to temper with the exhibit and nevertheless the appellant was never prejudiced by the operation as he was cooperative.

PW4 never disclosed to the trial court as to whether his informer had told him that the suspect is on motion and that any delay of arresting him would lead to his disappearance or the suspected wild meat being sold by the appellant is almost finished that any delay would mean the appellant will not be found in possession of the said wild meat.

I am of the firm view that the absence of a search warrant inserts doubts in my mind as to the legality of the search itself. It is obligatory to appreciate the rationale for the requirement of search warrants, as they are considered to be a civilian's pillar to lean-on as a Constitutional Right to dignity and privacy of a person.

Within our jurisdiction, reading of the **Police General Orders (P.G.O) 226**, shows the seriousness with which search warrants should be taken. Part of it reads: -

"1. The entry and search of premises shall only be affected either:

- (a) on the authority of a warrant of search; or

(b) in exercise of specific powers conferred by law on certain Police Officers to enter and search without warrant

(c) Under no circumstances may police officer enter private premises unless they either hold a warrant or are empowered to enter under specific authority contained in the various laws of Tanzania.

From the provisions above cited, and the fact that under **paragraph 2 (a) and (b) of the P.G.O,** there is even a requirement of obtaining permission from a Magistrate before effecting search, this reveals that the intention was to prevent abuse of powers of search and arrest. The requirement to obtain approval of a Magistrate is echoed in **Section 38 (2) of the CPA.**

Since the general rule under the Criminal Procedure Act is that search of a suspect shall be authorized by a search warrant unless, the same should be adhered to. Despite the respondent herein claiming that the appellant was not prejudiced of his rights by the search, but as there was no search warrant, I am fortified to declare the search to be illegal and hence the rights of the appellant were prejudiced. It is from the analysis above that, I do find this ground of appeal enough to fault the findings of the lower court. In that, I find no need of dealing with the rest of the grounds of appeal.

Consequently, this appeal is hereby allowed. I quash the conviction and set aside the sentence meted against the Appellant. I order the Appellant's immediate release unless he is being held for another lawful cause.

It is ordered accordingly.

Dated at Sumbawanga this 27th day of March, 2023.

T. M. MWENEMPAZI

JUDGE