

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(SUMBAWANGA DISTRICT REGISTRY)**

**AT SUMBAWANGA**

**RM. CRIMINAL APPEAL NO. 40 OF 2020**

(C/O Economic Crimes Case No. 26 of 2019 Resident Magistrate Court of  
Katavi)

**DAVID S/O MSHUKA ..... APPELLANT**

**VERSUS**

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

10 & 23/08/2021

**JUDGMENT**

**Nkwabi, J.:**

The appellant was resentful of the conviction and sentence of the trial court in Economic Crimes case No. 26 of 2019 in the Resident Magistrate Court of Katavi at Mpanda. The appellant went on trial in the Resident Magistrate court of Katavi on one count of unlawful possession of Government trophies 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 and sections 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.

After hearing both parties the trial court was satisfied with the evidence of the prosecution that the prosecution proved its case beyond reasonable doubt. The defence of the appellant to the effect that he met his arresters when he was walking and they told him he had left a luggage behind, then he was shot, he came to his senses when he was in hospital was not heeded to,

To show his disappointment with the conviction and sentence he listed three grounds of appeal in this court as they appear in the petition of appeal. I parrot only one of the grounds of appeal to show the unhappiness of the appellant against the decision of the trial court:

- 1. That the trial court erred at law for convicting the appellant basing on the contradictory evidence of the respondent's witnesses.*


During the hearing of this appeal, the appellant appeared in person on the one hand while the Respondent was dexterously represented by Mr. John

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Kabengula, learned State Attorney, who robustly resisted the appeal having the view that the prosecution proved its case beyond reasonable doubt and urged this court to uphold the conviction and sentence.

I adjourned the matter after hearing both parties for composing judgment. While doing so, I felt that there was a problem in respect of the search and seizure which was conducted during the night and directed the parties to address me on the situation. The matter was adjourned to give chance for the parties to prepare to address the court.


When the matter was called up for hearing of the matter raised by the court, the appellant as a lay person had nothing to submit and left it to the court to decide his fate. On his side, the respondent's learned State Attorney Mr. Kabengula, insisted that the search though conducted during the night without the leave of the court, it was proper as it was an emergency search and it was not in the premises, it was along the road. He prayed that the search and seizure should not be invalidated.



In my view, in regard to the search there is one doubt and one irregularity that invalidate the search and destroy the entire prosecution case.

In his evidence, PW3 indicated that he resides in Tabora. In his evidence, he showed that he came from Tabora on the very day when the appellant was arrested. He did not show the distance from Tabora to Katavi, he started communicating with the suspect on 01/07/2019. He does not indicate at what time he arrived at Mpanda - Katavi and started arranging for the arrest of the appellant. In criminal case, no speculation is permitted. The witness ought to be clear. He is not and the doubt should benefit the appellant to the effect that the search was not an emergency search.

The worst of it is in respect of the search. It appears that the search was not emergency like that happened in the case of **Emmanuel Lyabonga v Republic Criminal Appeal No. 257/2019** CAT at (Iringa Unreported) where the search which was an emergency one conducted when the police were in patrol, they got information about the sale and proceeded to agree where to meet for the transaction and it was day time as even the caution statement of the appellant was recorded from 17:00 to 18:40 hours which indicate that the search and seizure were done during the day unlike the

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search in this case. This is what the court of Appeal of Tanzania stated at page 16 of typed judgment:

*Moreover, since the appellant's polythene bag was searched and seized in a remote bushland at Kitandililo, not at his dwelling house, in the circumstances that no independent witness could be found, we are in agreement with the learned State Attorney that the operation was properly conducted.*

In the present case, since the search was not emergency one in the circumstance of this case since PW3 and his colleague came all over from Tabora, the RCO in Katavi ought to have made an arrangement for obtaining the proper approval of the court to conduct search during the night. Since no application to a magistrate was made for the search to be conducted during the night and the day was a working day, I hold that the search was an illegal search and hence the exhibit was illegally obtained. I have no better words on the situation than those stated by the Court of Appeal in **Janta Joseph Komba & Others v. Republic Criminal Appeal no. 95 of 2006** (C.A.T.):

*"We think that a lot of what is stated as above by the learned trial Principal Resident Magistrate with Extended Jurisdiction was speculation. ... Conviction in a criminal matter must be based on*



*good ground and speculation has no room. The burden is on the prosecution to prove beyond reasonable doubt, that the accused committed the offence with which he is charged.*

....

*... and the police are obliged to abide by the law like everyone else. The obtaining of the statements of the appellants while still in custody outside the time provided under the law for investigative custody, contravened the provisions of the law. Section 169 of the Criminal Procedure Act provides for exclusion of evidence illegally obtained ...*

*The prosecution did not show how the admission of the appellants' statements in the circumstances of this case would specifically and substantially benefit the public interest without unduly prejudicing the rights and freedom of any person."*

I take the words of the court of appeal in **Janta's case** (supra) as mine, mutatis mutandis. Since the search and seizure were illegal ones for lack of order from the court the same were suspect, the exhibits were illegally

obtained and, in my view, could not be used to base conviction of the appellant. I find the first ground of appeal to have merits and I second it. This ground alone disposes the appeal. I do not see the need to canvas the rest of the grounds of appeal.

The outcome of this appeal, with the greatest respect to the learned trial magistrate and the learned State Attorney who fought the appeal, I am satisfied that the trial court erred in law and fact in convicting the appellant in a case which was not proved beyond reasonable doubt. The conviction and sentence are hereby quashed and set aside respectively. The appellant is to be set free unless he is otherwise held for other lawful cause(s).

It is so ordered.

DATED and signed at SUMBAWANGA this 23<sup>rd</sup> day of August 2021.



  
**J. F. Nkwabi**


**Judge**

**Court:** Judgment is delivered in open court this 23<sup>rd</sup> day of August, 2021 in the presence of Mr. Simon Peres, learned State Attorney for the respondent via video link and the appellant who is present in person via video link.

**J. F. Nkwabi**  
**Judge**

**Court:** Right of appeal is explained.



  
**J. F. Nkwabi**  
**Judge**  
**23/08/2021**