

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

RM. CRIMINAL APPEAL NO. 101 OF 2021

**JERI S/O SIMTENGU @ LUKA APPELLANT
VERSUS**

THE REPUBLIC RESPONDENT

(Appeal from the decision of the Resident Magistrates' Court of Sumbawanga at
Sumbawanga)

(M. S. Kasonde, SRM)

Dated 7th day of October 2020

In

Economic Crimes Case No. 4 of 2019

JUDGMENT

17/05 & 15/06/2022

NKWABI, J.:

Satisfied with the evidence on the Respondent's side in respect of unlawful possession of Government Trophy offence, the trial court convicted and sentenced the appellant to 20 years imprisonment. It however, acquitted him of the offence of unlawful possession of ammunition without license.

In the trial court, the respondent presented five witnesses and tendered ten exhibits. During the preliminary hearing the appellant admitted that his premises were searched. The prosecution witnesses who conducted the search are PW1 Hendry, the Wildlife officer and PW2 Aliko, the Ward

Executive officer for Mpombwe ward. The search was conducted due to suspicion that the villagers of Kalambo village had killed an elephant. In the search, exhibit P3 to exhibit P8 were seized which are the government trophies. The appellant was taken to the police station where his caution statement was recorded, and later an extra-judicial statement (exhibit P9) was recorded by PW3 Mukama, the Justice of Peace. The appellant challenged the contents of the document albeit in cross-examination of PW3.

During the hearing of this appeal, the appellant appeared in court in person, unrepresented. The Respondent was represented by Ms. Marietha Maguta, learned State Attorney. In submission in chief, the appellant had no much words. He prayed to adopt his grounds of appeal as his submissions.

Responding to the grounds of appeal Ms. Maguta urged they resist the appeal since they support the conviction and sentence. On the 1st ground of appeal, Ms. Maguta argued that, this ground, exhibit P.E 1 which is a seizure certificate was procedurally and correctly received. It was also read over to the appellant. She also added that it is also corroborated by PW2 the ward

Executive Officer who witnessed the incidence, she prayed this ground be dismissed.

When Ms. Maguta submitted on the 3rd ground of appeal, she intimated her opinion that it is also unmerited. She insisted that they had other witnesses including (PW2) the leader of the ward. The appellant was also sent to justice of peace and his extra – judicial statement was admitted in court. She therefore urged me to dismiss the ground of appeal.

In respect of the 4th ground of appeal, Ms. Maguta contended that PW1 was a Game Officer who conducted the search while PW2 was the independent witness. There is also a statement given as extra- judicial statement tendered in court by PW3, that piece of evidence is credible and no any contradiction, she stressed.

As to the 5th ground of appeal, Ms. Maguta claimed that the same is also baseless. She pointed out that on 11th page of the judgment of the trial court, the defence of the appellant was considered. She prayed the ground of appeal be dismissed.

Reverting to the 1st and last grounds of appeal, Ms. Maguta asserted that the search was conducted in the presence of an independent witness. The same is corroborated by the extra judicial statement where the appellant was free to make it. She stated, they believe that they proved the case beyond reasonable doubt. She reiterated her prayer that the appeal be dismissed.

The appellant had nothing useful in rejoinder, he merely asked this court to consider his appeal.

I have carefully considered this appeal, I am of the considered view that the 1st ground of appeal disposes this appeal. The appellant, in this ground of appeal, complains that the respondent failed to prove its case beyond reasonable doubt and I purchase the complaint. This is based on the ground that, the search was conducted during the night at around 2:00 hrs (post-midnight) without the permission of the court being sought and granted. There is also no proof of a search warrant being issued for that purpose, just as the appellant complained in his defence. The anomaly contravenes the provisions of section 40 of the Criminal Procedure Act, Cap. 20 R.E. 2019,

because search during the night ought to be permitted by the Court. I reproduced the section.

"A search warrant may be issued and executed on any day (including Sunday) and may be executed between the hours of sunrise and sunset but the court may, upon application by a police officer or other person to whom it is addressed, permit him to execute it at any hour."

PW1 and PW2 did not say whether, in searching the house of the appellant, had in their possession a search warrant or not. In addition to that, there is no proof that they obtained the permission of the court to conduct the search at the house of the appellant during the night. As such the search and seizure are illegal. The evidence of PW1 and PW2 ought to be expunged, I proceed to expunge the same.

With such expungement of the evidence of PW1 and PW2, there is no other evidence that can stand to ground conviction of the appellant. Not even the extra-judicial statement since the appellant challenged it in cross-examination of PW3. That challenge was enhanced by the appellant when

he defended himself to that effect. As such, the extrajudicial statement requires corroboration to support conviction, as a matter of prudence and practice, see **John Cherehani and Another v. Republic**, Criminal Appeal No. 189 of 1989 (Unreported) (CAT).

As I have indicated above, the appellant in this Court, complained that PW1 and PW2 did not have a search warrant to warrant them conduct the search. In my view, since that was not an emergency search, then searching without search warrant and without the permission by the court, was highly irregular. Such evidence cannot be left to stand.

For the above reasons, I allow the appeal. The conviction and the sentence imposed on the appellant are hereby quashed and set aside respectively. The appellant is to be set free from prison unless he is held therein for another lawful cause.

It is so ordered.

DATED at SUMBAWANGA this 15th day of June 2022.




J. F. NKWABI

JUDGE