

IN THE HIGH COURT OF ZANZIBAR

HOLDEN AT TUNGUU

CRIMINAL APPEAL NO. 03 OF 2023

(ORIGINATING FROM REGIONAL MAGISTRATE COURT AT VUGA, IN
CRIMINAL CASE NO. 61 OF 2023)

AWADH SAID AWADH APPELLANT

V.

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

JUDGMENT

Dated: 30th August, 2023

S. HASSAN (J)

In the Regional Magistrate Court of Vuga, the appellant **AWADH SAID AWADH** was arraigned for the count of being in possession of narcotic drugs contrary to **section 15 (1) (a) of the Drugs and Prevention of Illicit Traffic Drugs Act No. 9 of 2009 as amended by Act No. 12 of 2011.**

The accused (appellant herein) was convicted with the offence and sentenced to serve 10 years in Education Center. Being aggrieved with such Judgment, the appellant lodged this appeal.

In the memorandum of appeal, the appellant lodged eight grounds of appeal and added additional three during the hearing of appeal. However, in view of what will be apparent shortly, I see no reason to reproduce the grounds of appeal.

The particulars of the charge sheet were that, on the 20/01/2020 at around 8:30pm at Magomeni Uwanja wa Mzalendo, Urban District of the Urban West Region of Unguja while the accused was in his Vespa registration no. Z 973 BK was found inside his tool box having possession of Narcotic Drugs of 20 transparent plastic bag containing brown stones each wrapped with transparent plastic of Heroine in brown stones in 6.047 grams, which is contrary to the law.

At the hearing of this appeal, the appellant appeared in person, unrepresented, while the respondent was represented by learned State Attorney Mr. Shamsi Saad.

During the hearing the appellant did not have much to say when asked to argue his appeal. He opted to adopt what was stated in his memorandum of appeal.

On the other side, the Prosecution did not resist or oppose this appeal, they supported this appeal in particularly **grounds 1, 2 ,4, 5 and 6** and advance the following reasons:

That, there was no independent witness as required by law during search and arrest of the accused, also there was no certificate of seizure and therefore the evidence of **PW2, PW4** and **PW5** created doubt. Mr Shamsi went on to support the appeal by stating that there was contradiction which goes to the root of the case between the evidence of PW2 and PW4 on who opened the appellant tool box of his vespa.

Another contradiction is between the evidence of **PW4** and **PW5** whereby **PW4** testified that the accused was with his wife when he was arrested while **PW5** testified that the accused was alone as shown at page 13 and 25 of the proceedings and such contradictions goes to the root of the matter and remove the credibility of the witnesses. With those reasons the Prosecution did not resist this appeal.

Having heard the submission of the parties and after a careful perusal of the trial court proceeding, this being the first appellant court, this court has a duty to step into the trial court shoes by going through the evidence adduced in order to reach a just decision and arrive to its own independent conclusion as held in the case of **Mfaume v. R,(1980) TLR 167**, where the Court of Appeal held the following:

" A judge on the first appeal should reappraise the evidence because an appeal is in affect a rehearing of the case"

Guided by the above principle relating to the duty of the first appellant court, and having gone through the records, I am of the view that the Prosecution is right not to resist this appeal and that this appeal has merit and deserves to succeed based on the following findings.

My findings shall be limited to **grounds 1, 4 and 5** of the appeal concerning the contradiction and discrepancy in the prosecution witness testimony particularly the evidence of **PW2** and that of **PW4**.

With respect to 1st ground of appeal, the appellant has erred the trial Magistrate by convicting him without the prosecution presenting 2 independent witnesses, the law is well settled in matters of search in the presence of independent witnesses. The Court of Appeal in ***DPP v. Mussa Hatibu Sembe, Criminal Appeal No. 130 of 2021*** (unreported) dealing with the case of arrest and search which was conducted at a bus stand during day time without involving an independent witness. In that search the respondent was alleged to have been found with heroin. It held that since there was no independent witness it was doubtful that the respondent was found with narcotics. Coupled with other errors on identification and chain of custody the appeal was dismissed.

Similarly, in this case the appellant was searched and arrested and the discovery of the drugs was conducted in the presence of **E2154 D/C Coplo Juma Omar (PW4)** a police officer and interested party in the outcome of the case and without **PW2** taking any effort or trouble to call independent civilian witness to witness the search as required by **section 148 (1) of the Act No 9 of 2009**. Therefore, this failure vitiates the whole proceedings and the prosecution case and that the prosecution has failed to prove their case beyond reasonable doubt.

With respect to contradictions and discrepancies, the law is also settle on the issues and that, the court has duty to examine them and established whether they are minor or material and whether they go to the root of the case as held so in the case of ***Mohamed Said Matula v. R [1995] TLR 3***, where the Court of Appeal stated:

“ Where the testimony by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible, else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter”

At the trial court, the key witnesses to the prosecution were Assistance **Insp Khamis Juma Ame (PW2)** and **E2154 D/C Coplo Juma Omar (PW4)**. In his testimony, PW2 testified that he was tipped by an informer that there is someone by the name of Awadh residing at Mpendae dealing with drugs and he was given the phone number of Awadh and he communicated with him and agreed to at Magomeni Uwanja wa Mzalendo. **PW2** and **PW4** met with the appellant at around 8:25pm night and the appellant was on his vespa, **PW2** conducted body search to the appellant and did not find anything and there after searched the tool box of the vespa and discovered the hidden drugs. The search and discovery of drugs was witnessed by **PW4**.

In cross examination **PW2** stated that he cant remember if the appellant was arrested together with a women on that day (**page 13** of the proceedings).

On the other hand at **page 25** of the proceedings, **PW4** who was with **PW2** at all time during the search, discovery of drugs and arrest, testified in cross examination that the appellant was with a woman at a time of arrest. It is the submission of the Prosecution side that, such contradictions and discrepancies statement between **PW2** and **PW4** goes to the root of the matter and remove the credibility of their evidence.

To determine whether the discrepancy testimony of **PW2** and that of **PW4** is material or not and whether it goes to the root of the matter, I shall make reference to the case of **Mohamed Haji v. DPP, Criminal Appeal No. 225 of 2018** (unreported) where the Court of Appeal cited the case of **Dikson Elia Nsamba Sapwata and Another v. R, in Criminal Appeal No. 92 of 2007** (unreported) at page 7 while quoting with approval the author of Sakar, the **Law of Evidence, 16th Edition, 2007** had this to say:

“ Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties case, material discrepancies do.”

Having analyzed the evidence in record, I am of the view that the discrepancy statement between that of **PW2** and **PW4** are not normal discrepancies and this court agrees with appellant that, the discrepancies are such material and goes to the root of the matter and therefore corrode the credibility of the prosecution witnesses and therefore this court find merits in **4th and 5th** grounds of appeal.

Those 3 grounds of appeal are sufficient to dispose of this appeal and there is no need to address and make findings on the remaining grounds of appeal.

In the up short, this appeal is allowed and the conviction and sentence imposed by the RM' Court is hereby quashed and set aside.

The Appellant **AWADH SAID AWADH** is to be released from the Education Center with immediate effect unless he is being held there for other lawful purpose.

It is so ordered.

Dated: **30th August, 2023.**

S. HASSAN (J)

30/8/2023

Court:

Right of Appeal is explained to the aggrieved part.

S. HASSAN (J)

30/8/2023

I certify that this is a true copy of original.

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/REGISTRAR.

HIGH COURT - ZANZIBAR

