

IN THE HIGH COURT OF ZANZIBAR
HOLDEN AT TUNGUU
CRIMINAL CASE NO. 66 OF 2022
THE DIRECTOR OF PUBLIC PROSECUTIONS
V.
MASOUD AHMED SEIF

JUDGMENT

Dated: 5th January, 2023

S. HASSAN (J)

The accused person Masoud Ahmed Seif was arraigned on the 4/10/2022 for the charge of unlawful possession of narcotic drugs contrary to the provision of **section 21 (1) (d)** of the Zanzibar Drugs Control and Enforcement Authority Act, No. 8 of 2021 of the laws of Zanzibar, when this case was in the hands of Hon Salma A. Hassan (J), before the case was transferred to me.

In the particulars of the offence, it is alleged that, the accused person on the 6/02/2022 at 17.00pm at Baraste Kipande within the Urban District, Urban West Region of Unguja, was found with possession of 13 small stone packets of 1.4645gram suspected to be narcotic drugs of heroin powder contrary to the law.

Upon answering to the offence charged against him, the accused person denied the charge and the plea of not guilty was entered. To prove the charge against the accused person, the prosecution presented **Five (5) witnesses and tendered Two (2) exhibits**. The hearing of the case commenced on the 7/11/2022 and concluded on the 27/12/2022

During the hearing of the case, the prosecution was represented by learned Senior State Attorney Mohamed Abdalla, while the accused person Masoud Ahmed Seif was unrepresented and defended himself.

Juma Othman Bakari (PW1), testified that he was in his office at the Government Chemist, doing his duties. He received the exhibit and the letter from the officer of the Zanzibar Drugs Control and Enforcement Authority (hereinafter referred to as Authority) together with form no. ZDCEA 018 for laboratory analysis. He inspected the letter and the form ZDCEA 018 to satisfy himself that what was written in the form were correct as what is in the sealed bag. He unsealed the exhibit in front of the officer from the Authority, he put the exhibit in the cabinet he uses alone, he registered the exhibit in the exhibit register, he handed over the letter to his Boss in order to be assigned the work, after being assigned to perform analysis he took the exhibit from the cupboard, went to the laboratory weighed the exhibit and took sample for test. After he finished the test, he prepare the result form he filled form ZDCEA018, he sealed the exhibit with the red seal of the government chemist and stamp it with the government chemist stamp which reads " chemical laboratory zanzibar", and handed them over to the officer of the Authority for their custody. Furthermore PW1 tendered before this court the form ~~ZDCEA018~~ ^{analysis report} and the same was admitted and marked as **Exhibit P1**, he also tendered Khaki Enveloped which was sealed contained 13 small plastics in the form of stones and the same was admitted and marked as **Exhibit P2**.

On cross examination, PW1 further stated that, in their office there are other officers to receive the exhibit, but for **exhibit PW2** he was the one to receive it and perform the test. He denied that he received the form ZDCEA018 from the street, he further stated that their work ethics does not allow to put the envelope contain suspected drugs to another envelope after they have finished their test and analysis. PW1 also stated that he used the analytical balance to determine the weigh of the drugs and the power weighed 1.4645 gram. He further testified that, he took the sample for colour test and the thin layer cromotographic show the result that the powder was heroine. He further explained that the form ZDCEA018 is in accordance with Act No. 8 of 2021, he denied that the office of government chemist possesses drugs and further explained that he received the exhibit from Stefano Khamis on 7/2/2022 and returned it to him after analysis on 17/2/2022

Issa Yussuf Matias, (PW2) testified that, his duties is to do patrol for drugs users, and that he is in court to testified against the accused person Ahmed Masoud Seif on the case identification number ZDCEA/ HQ/ IR/ 8/2022, which happened on the 6/2/22 at 16.50pm when he was in patrol with his fellow officer Abdillah Juma Kona at Mlandege. He further testified that while at Mlandege, they receive information from their informer that at Baraste Kipande there is a person suspected of dealing with drugs. He stated that they went to Baraste Kipande with their informer arrived there around 17:00 pm and managed to

identified the suspect standing. He managed to apprehend the suspect and put him under arrest while his fellow officer Abdillah Juma Kona was witnessing. He further stated that, they identified themselves to the suspect that they are officers from the Authority and asked the suspect to identify himself

He went on to state that, he saw the suspect wanted to swallow something but he managed to stop him. He saw a foiled packet and when he opened it he found 13 small packets in the form of stones wrapped with plastic suspected to be drugs. He stated that he explained to the suspect about the offence he suspected with, and they left Baraste Kipande and went to the office, while the packets was under his custody, they arrived at the Authority around 17:50pm. He further testified that while in the office he opened again the foiled packet counted the small stones and got the same total number of 13 small packets his fellow officer was witnessing. He further stated that he opened the charge number ZDCEA /HQ /IR/ 8/2022 against the suspect for possession of drugs. At 18:00pm he took the foiled packet and put it in the khaki envelope and sealed the envelope with "lakiri" and put identification number on the envelope which reads ZDCEA/ HQ/IR/8/2022 and gave the khaki envelope to the exhibit keeper in the office, PW1 named the exhibit keeper as Aziza Amour, he further testified that the exhibit keeper did not witnessed when he put the drugs in the khaki envelope he only gave her the sealed khaki envelope. He further stated that he did everything in front of his fellow officer Abdillah Juma Kona and the accused. He explained that for now he will not know the khaki envelope will have which "lakiri", PW2 pointed to the accused and identified him as Masoud Ahmed Seif.

In cross examination PW2 testified that he received the information from his informer at Mlandege, he stated that when he received the information they were in their daily patrol, he stated that he did not know where the informer comes from, he further testified that after they received the information they went to Baraste Kipande, the incident took place at narrow street "kichochoroni" where no cars can pass through and no civilian witness was present when he apprehended and search the accused. He further stated that he does not know about the Sheha of Baraste Kipande and also he did not know if nearby houses they were people inside. He further stated that he did not see the need to call an independent witness. He went on to name the few basics right of accused while in custody as, the right to identify themselves and the right of the accused to identify himself to them, right to take accused statement and the right of the accused to call his relatives. He further stated that the accused relatives were not present when they arrested the accused.

PW2 went further to state that he cannot call the informer to testify in court because it is not his duty call witness to testify in court. He further testified that he can not reveal the identity of the informer who gave them the information about the accused, he further testified that he did not take any photos during the arrest of the accused.

Aziza Amour Pandu (PW3) gave her evidence and testified that she is the exhibit keeper of the ZDCEA. She stated that on the 6/2/2022 at 18.00pm she received Khaki enveloped from officer Isaa Yussuf Matias sealed with red "lakiri" marked with identification number ZDCEA/HQ/IR/8/2022 she stated that she received the exhibit in the presence of officer Abdillahi Juma Kombo of ZDCEA and the accused person. She kept the exhibit on the special cabinet she uses alone and on the 7/2/2022 at 8.00am she handed over the exhibit sealed with red "lakiri" to officer Stefano Khamis Meza together with a request letter for lab test and laboratory form for exhibit analysis. On 17/2/2022 at around 12.30pm, officer Stefano Khamis Meza returned the exhibit sealed with government chemist seal "lakiri" with the same identification number ZDCEA/HQ/IR/8/2022 and she kept the exhibit in the special exhibit cabinet until the exhibit was required to be sent to court

On cross examination she stated that in the enveloped showed to her in court the red "lakiri" of ZDCEA is no longer there and the envelope contained the seal from the government chemist. She further stated that she does not know what was inside the khaki envelope but she was informed by his co worker that it contain drugs.

Stefano Khamis Meza (PW4) testified that on the 7/2/2022 at around 8.00am he received a file from his incharge with an exhibit, a form for a lab test and a request letter for a lab test. The exhibit was in khaki enveloped and was marked as ZDCEA/HQ/IR/8/2022 and on the same day he went to the government chemist for test analysis, while at the government chemist office he was received by Juma Othman Bakari who is a government analyst. He further stated that he handed over the exhibit, a letter and a form to Mr Juma and witnessed Mr Juma unsealed the khaki envelope and counted the small stones packets of 13. He signed the form and went back to his Office. On the 8/2/2022 he went to visit a crime scene at Baraste Kipande with officer Matias. On the crime scene I saw the place was narrow, cars cannot pass and there was a house with a shop selling house items . On the 17/2/2022 at around 11.00am he went back at government chemist to collect the exhibit, lab form and a report which stated the weigh of the drugs is 1.4645grams, he signed the handing over form and went back to his office. Upon arriving at the office he immediately handed over the

exhibit to the exhibit keeper officer Aziza Amour Pandu. He further stated that he put the test form and report on his investigation file.

On cross examination he stated that he was given the exhibit by officer Aziza Amour Pandu, the exhibit was sealed and he did not unsealed it to see what is inside the khaki envelope. He further stated that the red "lakiri" which was sealed on the khaki envelope is not shown on the enveloped shown to him in court. When asked whether there was an independent witness to verify the arrest of the accused he explained that there was no independent witness, there were only official officers from ZDCEA, himself, officer Matias and driver Haji Ali Haji. He admitted that procedurally the accused person is required to go with officers when the visit a crime scene but for the security reason they did not take the accused at crime scene.

Abdillahi Juma Kona (PW5) testified that he was present when the accused was arrested by officer Matias. He stated that they receive information from their informer when they were at Mlandege on patrol. He stated that they receive the information/tip about 16.50pm and around 17.00pm he witnessed officer Matias arresting the accused person. He witnessed the accused trying to swallow the foiled packet but officer Matias managed to stop the accused from swallowing the foiled packet. The accused was arrested and cautioned with unlawfull possession of drugs. Thereafter they left Baraste Kipande and went to the Office while the accused was under arrest and the exhibit was under the custody of officer Matias. While in their office he witnessed officer Matias re counting the small stones packets and got the same number of 13 as it was during the arrest. Officer Matias opened the case file against the accused and gave it number ZDCEA/HQ/IR/8/2022 at around 18.00pm. He further stated that he witnessed Officer Matias putting the packet in the khaki envelope and sealed it with red lakiri and gave it identification number ZDCEA/HQ/IR/8/2022 and he witnessed officer Matias handing over the exhibit to the exhibit keeper officer Aziza Amour Pandu while the accused person was present and witnessing.

On cross examination, he stated that it is against the law to reveal the identity of their informer and they receive oral information about the accused dealing with drugs. He stated that at the crime scene they did not see the need to call an independent witness, he also testified that he witnessed officer Matias putting the packet in the khaki envelope and sealed it with ZDCEA red seal "lakiri" he went on to state that there is no evidence showing that the accused was present and witnessing officer Matias putting seal on the khaki envelope.

On the 12/12/2022 the prosecution closed their case and the court found the accused has a case to answer and hence his rights under section 216 of the Criminal Procedure Act No.7 of 2018 were explained to the accused and accused opted to testify himself without calling a witness for his defence.

On the 27/12/2022 the accused person was the only witness to enter defence and give evidence, the court will refer the accused person for the purpose of defence evidence as DW1.

DW1 (MASOUD AHMED SEIF) testified that he remember coming from the hospital to visit his relative on the 5/2/2022, his relatives was admitted in the hospital and he brought him tea and he was there until 20.00pm. On his way back at Kisiwandui, he was surrounded by group of people and asked him where he is coming from, and replied he was coming from the hospital. He further stated that he was put in the mini bus and was taken to ng'ambu police station and stayed there until the next day on 6/2/2022. He asked to be released or granted bail, he further stated that on the 20:00pm he was given a bail form by police officer to fill it in and put his signature which he did. The same night of 6/2/2022 he was taken to Migombani at ZDCEA office and spent the night there and on the 7/2/2022 he was ask to give his statement either in front of the advocate, his family members or a close friend. He further stated that, he explained to the officers of ZDCEA that he will not give his statement because he was not sure if he will have an advocate but agreed to give his statement in the presence of his family.

He went on to state that he did not give any statement but he was granted bail and up to the month of August he was called back at the office of ZDCEA and was told to have a case which he explained to the court he did not know anything about the case, and there after he was brought to the court and charged for unlawful possession of drugs. He went on to testify that there was no civilian witness when he was arrested as alleged by prosecution at Baraste Kipande which is a busy area full of people.

He also testified on the testimony of PW1 who stated in his evidence to have 3 documents but he only submitted and 2 documents in the court, and the remaining document was submitted by the investigator, hence he prayed to be acquitted as he is sick with back problem and has a blood pressure.

In cross examination he stated that he did not know the people who arrested him by names by he can identified them if he see them. He further stated that he did not know who

arrested him if either it was the police or officers from ZDCEA. He maintained that he was arrested at Kisiwandui and not Baraste Kipande as alleged by the prosecution.

Having heard the evidence of both sides in this case, this court is now task to make findings and give judgment on matter in hand by determine whether the prosecution have proved the charge against the accused person beyond the standard required which is beyond reasonable doubt or not.

In this case it is not disputed that PW1 in his testimony testified that he weighed the alleged drugs powder and got the weigh of 1.4645 gram, he took the sample for colour test and the thin layer which show the result that the powder was heroine.

What remain is for the prosecution to prove the charge against the accused beyond reasonable doubt. It is a settle law that in criminal cases the duty to prove the charge beyond reasonable doubt is on prosecution as held in the case of **Christian s/o Kaale and Rwekiza s/o Bernard v. R [1992] TLR 302**, the Court held that:

" the prosecution has a duty to prove the charge against the accused beyond all reasonable doubt and an accused ought to be convicted on the strength of the prosecution case"

Moreover, in the case of **Milburn v. Regina [1954] TLR 27**, the Court noted that:

" it is an elementary rule that it is for the prosecution to prove its cases beyond reasonable doubt and that should be kept in mind in all criminal cases.

Having laid down the duty of prosecution to prove the case beyond reasonable doubt, now this court will make findings and determine whether the prosecution has managed prove the charge against the accused person beyond reasonable doubt.

For a charge of unlawful possession of narcotic drugs to succeed, the prosecution has to prove the following elements *(i) that the accused was unlawful in physical possession or in control of the drugs (this is a physical element,)* *(ii) they must also prove that the accused had a knowledge of the possession of the item, (this is the mental element)*. In the case of **Peter Mwangai Kariuki v. R [2015] e KLR, Mativo J**, stated the following:

" In my view, possession includes two elements: namely being in physical control of the item and knowledge of having the item, to be guilty of possession, an accused person must be shown to have knowledge of two things, namely, that the accused

knew the item was in his custody and secondly he knew that the item in question was prohibited. A person has possession of something if the person knows of its presence and has physical control of it, or has the power and intention to control it".

Also in the case of Moses Charles Deo v. R [1987] it was held that:

"for a person to be found to have had possession, actual or constructive, of goods it must be proved either that he was aware of their presence and that he exercised control over them"

To prove his innocence, the accused person raised doubt in three main issues which are: (i) the identity of informer was not revealed by the prosecution, in the court (ii) he was denied his basic rights on arrest under law, and last (iii) no civilian / independent witness was present when he was search and arrest.

This court will first address the issue of informer and whether his or her identity can be revealed, PW2 and PW5 testified that while on patrol at Mlandenge, they were informed by their informer that there is a person suspected of dealing with drugs at Baraste Kipande, the accused person on cross examination asked frequently PW2 and PW5 on the identity of the informer and the witnesses were firm to state that they cannot reveal the identity of their informer as the informer is protected by Law.

In determining this issue, I have refer **Act No. 8 of 2021** to be satisfied on the protection or otherwise of the identity of the informer, I have come across to **section 45 (1)** which reads as follows:

Protection of informer 45(1) ***"An informer who gives genuine and authentic information as provided under section 44 of this Act shall be protected"***.

Hence this court agrees with the testimony of PW2 and PW5 that, the identity of the informer is protected under section 45 (1) of the Act No. 8 of 2021. Hence the issue of informer identity to be revealed by prosecution as raised by the accused person has no merit.

Secondly this Court will now determine issue (ii) raised by the accused, in cross examination PW2 was asked by the accused person on his basic right under the law, the accused person being a layman this court is of the view that the accused person was referring to his right of arrest procedures while under arrest as provided under the law. PW2

stated the few basics right of accused while in custody as, the right to identify themselves and the right of the accused to identify himself to them, right to take accused statement and the right of the accused to call his relatives. He further stated that the accused relatives were not called when the accused person was under arrest. In his defence the accused person (DW1) stated that he told the officers of ZDCEA that he will give his statement in the presence of his relatives.

This court made reference to form **ZDCEA 006** "Karatasi ya maelezo ya onyo" where the accused person stated the following "***mimi Masoud Ahmed Seif nakataa kutoa maelezo kwa leo hadi familia yangu ije na kuchagua nani ashuhudie nikitoa maelezo yangu. Mwisho wa maelezo yangu kwa sasa.***"

Court has made reference to **section 46 (1) of the Act No. 8 of 2021** where the Act has detailed the procedures on the right of accused person while under arrest. This court is of the firm view that the procedures laid down under **section 46 (1)** of the Act (supra) are not there for cherry picking, in fact the law has put strict procedures to be followed when the accused is under arrest, anything short of that make the whole process of arrest null and void. It is settle law that anything done contrary to the law is null and void, see the case of **DPP v. Doreen John Mtemba, Criminal Appeal No. 359 of 2019** (unreported). This court agree with the accused person that his arrest was done contrary to the law, and therefore the arrest made to the accused is null and void.

Last this court will determine the issue of civilian or in other words independent witness and the first element of possession which is the physical element and see if the prosecution has proved beyond reasonable doubt that the accused person was in physical possession or in control of the drugs. Here I will evaluate the evidence of PW2 and that of DW1. In his testimony PW2 testified that on the 6/2/22 at 16.50pm when he was in patrol with his fellow officer Abdillah Juma Kona at Mlandege they receive information from their informer that at Baraste Kipande there is a person suspected of dealing with drugs. He stated that they went to Baraste Kipande with their informer arrived there around 17:00 pm and managed to identify the suspect standing. He managed to apprehend the suspect and put him under arrest while his fellow officer Abdillah Juma Kona was witnessing. He went on to state that, he saw the suspect wanted to swallow something but he managed to stop him. He saw a foiled packet and when he opened it he found 13 small packets in the form of stones wrapped with plastic suspected to be drugs.

The testimony of PW2 has established that during the arrest of the accused person only himself and fellow officer Abdillah Juma Kona from ZDCEA were present. In cross examination PW2 was asked if there was any civilian witness present during the search and arrest PW2 replied as follows: " **I did not see the need to call any civilian witness**" Officer Abdillah Juma Kona who was present when PW2 was arresting the accused also testified as PW5 and when asked in cross examination on the presence of civilian witness he replied as follows: " **at the crime scene we did not see the need to call a civilian witness**" On the other side DW1 testified that he was arrested at Kisiwandui around 20:00pm on his way back from the hospital.

PW2 and PW5 have told this court that they arrested the accused person at Baraste Kipande around 17.00pm and that there was no independent witness to witness the search and arrest and to witness that the accused was indeed in physical possession or in control with the alleged drugs. The court is of the view that the time of 17:00pm is very early in the evening and it is natural that during the arrest some people will remain present to witness the arrest. But the officers from ZDCEA chose not call a civilian or an independent witness to corroborate the evidence of prosecution case. This court acknowledge as a matter of principle that the evidence given by PW2 and PW5 as officers from ZDCEA is entitled to credence and ought to be believed, but a law has put mandatory requirement that when a Commissioner General or an authorized officer while exercising the powers of inspection and search to invite two independent witnesses during inspection and search.

The legal requirement of having independent witnesses when the accused is searched or inspected is laid down in section **42 (2) of the Act No. 8 of 2022** which reads as follows:

42 (2) "The Commissioner General or an authorized officer shall, while exercising the powers of inspection and search, invite two independent witnesses during inspection and search".

The testimony of PW2 and PW5 that they did not see the need to call an independent witness during search while the law make its mandatory to do so, is a lame excuse which this court cannot just ignore or turned a blind eye, it is settle laws that anything done contrary to the law is null and void, see the case of **DPP v. Doreen John Mtemba, Criminal Appeal No. 359 of 2019** (unreported) therefore the search and inspection made to the accused person contrary to section **42(2) of the Act No. 8 of 2021** is null and void.

Moreover, the High Court of Zanzibar in the **Criminal Case No. 69 of 2022 Hon S.A.HASSAN, (J) and Criminal Appeal No. 20 of 2022, Hon Issa, (J)** have both addressed the issue of independent witness thoroughly and at the end acquitted the accused for failure of prosecution to provide independent witness as required by the law.

I am aware and sober to the fact that the decision of one High Court Judge is not binding to another High Court, and that each case has to be decided on its own merits, but similar facts have occurred in this case with those of Criminal Cases No. 69 of 2022 and Criminal Appeal No. 20 of 2022, where no independent witnesses was present during inspection and search of the accused as required by the law, hence this court find no valid reason to depart with the findings of fellow Judges on this matter in hand.

It is clear that in the absence of the two independent witnesses as required by law, the inspection and search of the accused becomes doubtful as it was held in the case of **DPP v. Mussa Hatibu Sembe in criminal appeal no 130 of 2021** (unreported) , the Court of Appeal observed the following:

“ we do not find anything to fault the trial judge who held that PW6 was an interested person hence for the interest of justice he could not be a free witness for the search and seizure. This omission leads to the conclusion that, since there was no independent witness it is doubtful whether the respondent was found trafficking in the narcotic drugs”.

In this case the accused person was alleged to be searched and arrested in Baraste Kipande, a place where there are houses and so many people at a time of arrest, the fact that PW2 has searched the accused person without having independent witness cast doubt on whether the accused was indeed at Baraste Kipande at a time of arrest or whether he was in physical condition or in control of the drugs, in the case of **Fanuel s/o Kiula (1967) H.C.D 396** it was held that:

“ it is not necessary to accept the defence of the accused in order to find him not guilty, all that the accused need to do is to raise a reasonable doubt as to his guilt.”

This court is of the firm view that the accused has raised a reasonable doubt as to his guilt and the prosecution has failed to prove the first element of possession which requires the accused to be in physical possession or in control of the drugs.

Having established that the prosecution has failed to prove the charge against the accused person beyond reasonable doubt, this court will not labour any further, I have indeed elaborate enough on all issues, particularly on the importance of having independent witnesses as required by section **42(2) of Act No. 8 of 2021**. What follows is for this court to acquit the accused person Masoud Ahmed Seif against the charge of being found in unlawful possession of illicit drugs contrary to **section 21 (1) (d) of the ZDCEA Act No. 8 of 2021**. The accused is hereby acquitted and ordered to be released immediately from the custody unless otherwise he is held there for other lawful reasons.

It is so ordered.

Court:

Right of Appeal is explained to the parties.



S. HASSAN (J)

Court:

The Judgment is delivered today 5th January, 2023 in the presence of SSA Moh'd Abdalla for the Prosecution, and in the presence of the accused person Masoud Ahmed Seif.